



JUDICIAL REFORM INDEX

FOR

KOSOVO

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Introduction

The Judicial Reform Index (JRI) is a tool developed by the American Bar Association's Central and East European Law Initiative (ABA/CEELI). Its purpose is to assess a cross-section of factors important to judicial reform in emerging democracies. In an era when legal and judicial reform efforts are receiving more attention than in the past, the JRI is an appropriate and important assessment mechanism. The JRI will enable ABA/CEELI, its funders, and the emerging democracies themselves, to better target judicial reform programs and monitor progress towards establishing accountable, effective, independent judiciaries.

ABA/CEELI embarked on this project with the understanding that there is not uniform agreement on all the particulars that are involved in judicial reform. In particular, ABA/CEELI acknowledges that there are differences in legal cultures that may make certain issues more or less relevant in a particular context. However, after a decade of working in the field on this issue, ABA/CEELI has concluded that each of the thirty factors examined herein may have a significant impact on the judicial reform process. Thus, an examination of these factors creates a basis upon which to structure technical assistance programming and assess important elements of the reform process.

The technical nature of the JRI distinguishes this type of assessment tool from other independent assessments of a similar nature, such as the U.S. State Department's *Human Rights Report* and Freedom House's *Nations in Transit*. This assessment will *not* provide narrative commentary on the overall status of the judiciary in a country. Rather, the assessment will identify specific conditions, legal provisions, and mechanisms that are present in a country's judicial system and assess how well these correlate to specific reform criteria at the time of the assessment. In addition, this analytic process will not be a scientific statistical survey. The JRI is first and foremost a legal inquiry that draws upon a diverse pool of information that describes a country's legal system.

Assessing Reform Efforts

Assessing a country's progress towards judicial reform is fraught with challenges. No single criteria may serve as a talisman, and many commonly considered factors are difficult to quantify. For example, the key concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret "evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution." Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 611 (1996). Larkins cites the following faults in prior efforts to measure judicial independence:

- (1) the reliance on formal indicators of judicial independence which do not match reality, (2) the dearth of appropriate information on the courts which is common to comparative judicial studies, (3) the difficulties inherent in interpreting the significance of judicial outcomes, or (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

Id. at 615.

Larkins goes on to specifically criticize a 1975 study by David S. Clark, which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his "judicial effectiveness score," Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405 – 442 (1975).



The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including these factors, Clark overstated . . . the independence of some countries' courts, placing such dependent courts as Brazil's ahead of Costa Rica's, the country that is almost universally seen as having the most independent judicial branch in Latin America.

Larkins, *supra*, at 615. Reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: "[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy." Larkins, *supra*, at 616.

ABA/CEELI's Methodology

ABA/CEELI sought to address these issues and criticisms by including both subjective and objective criteria and by basing the criteria examined on some fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary*; *Council of Europe Recommendation R(94)12 "On the Independence, Efficiency, and Role of Judges"*; and *Council of Europe, the European Charter on the Statute for Judges*. Reference was also made to a Concept Paper on Judicial Independence prepared by ABA/CEELI and criteria used by the International Association of Judges in evaluating membership applications.

Drawing on these norms, ABA/CEELI compiled a series of 30 statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary. To assist assessors in their evaluation of these factors, ABA/CEELI developed corresponding commentary citing the basis for the statement and discussing its importance. A particular effort was made to avoid giving higher regard to American, as opposed to European concepts, of judicial structure and function. Thus, certain factors are included that an American or European judge may find somewhat unfamiliar, and it should be understood that the intention was to capture the best that leading judicial cultures have to offer. Furthermore, ABA/CEELI reviewed each factor in light of its decade of experience and concluded that each factor may be influential in the judicial reform process. Consequently, even if some factors are not universally-accepted as basic elements, ABA/CEELI determined their evaluation to be programmatically useful and justified. The categories incorporated address the quality, education, and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary.

The question of whether to employ a "scoring" mechanism was one of the most difficult and controversial aspects of this project, and ABA/CEELI debated internally whether it should include one at all. During the 1999-2001 time period, ABA/CEELI tested various scoring mechanisms. Following a spirited discussion with members of the ABA/CEELI's Executive and Advisory Boards, as well as outside experts, ABA/CEELI decided to forego any attempt to provide an overall scoring of a country's reform progress to make absolutely clear that the JRI is not intended to be a complete assessment of a judicial system.

Despite this general conclusion, ABA/CEELI did conclude that qualitative evaluations could be made as to specific factors. Accordingly, each factor, or statement, is allocated one of three values: *positive*, *neutral*, or *negative*. These values only reflect the relationship of that statement to that country's judicial system. Where the statement strongly corresponds to the reality in a given country, the country is to be given a score of "positive" for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a "negative." If the conditions within the country correspond in some ways but not in others, it will be given a



“neutral.” Cf. Cohen, *The Chinese Communist Party and ‘Judicial Independence’*: 1949-59, 82 HARV. L. REV. 972 (1969), (suggesting that the degree of judicial independence exists on a continuum from “a completely unfettered judiciary to one that is completely subservient”). Again, as noted above, ABA/CEELI has decided not to provide a cumulative or overall score because, consistent with Larkin’s criticisms, ABA/CEELI determined that such an attempt at overall scoring would be counterproductive.

Instead, the results of the 30 separate evaluations are collected in a standardized format in each JRI country assessment. Following each factor, there is the assessed correlation and a description of the basis for this conclusion. In addition, a more in-depth analysis is included, detailing the various issues involved. Cataloguing the data in this way facilitates its incorporation into a database, and it permits end users to easily compare and contrast performance of different countries in specific areas and—as JRIs are updated—within a given country over time.

Social scientists could argue that some of the criteria would best be ascertained through public opinion polls or through more extensive interviews of lawyers and court personnel. Sensitive to the potentially prohibitive cost and time constraints involved, ABA/CEELI decided to structure these issues so that they could be effectively answered by limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system. Overall, the JRI is intended to be rapidly implemented by one or more legal specialists who are generally familiar with the country and region and who gather the objective information and conduct the interviews necessary to reach an assessment of each of the factors.

One of the purposes of the assessment is to help ABA/CEELI — and its funders and collegial organizations — determine the efficacy of their judicial reform programs and help target future assistance. Many of the issues raised (such as judicial salaries and improper outside influences), of course, cannot necessarily be directly and effectively addressed by outside providers of technical assistance. ABA/CEELI also recognizes that those areas of judicial reform that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary; and yet, every judiciary does need to be well-trained. Moreover, the nexus between outside assistance and the country’s judiciary may be tenuous at best: building a truly competent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, it is important to examine focal areas with criteria that tend toward the quantifiable, so that progressive elements may better focus reform efforts. ABA/CEELI offers this product as a constructive step in this direction and welcomes constructive feedback.

Acknowledgements

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Kosovo Background

Legal Context

Since June 1999, when NATO forced the withdrawal of Yugoslav forces from Kosovo, the province has been administered by international civil and security presences authorized by the United Nations Security Council, in Council Resolution 1244 (June 10, 1999). The international civil administration—the United Nations Mission in Kosovo (UNMIK)—is headed by the Special Representative of the UN Secretary General (SRSG). Three cooperating international organizations now operate the four pillars of the UNMIK structure: Pillar I “Police and Justice” (UN);¹ Pillar II “Civil Administration” (UN); Pillar III “Democratisation and Institution Building” (Organization for Security and Co-operation in Europe (OSCE)); and Pillar IV “Economic Reconstruction” (European Union (EU)). In addition to providing an interim administration, UNMIK is charged with establishing “an independent, impartial and multi-ethnic judiciary.”

The international security presence (KFOR) operates under a unified military control and command structure separate from UNMIK. It was deployed, among other things, to establish a durable cessation of hostilities, provide a safe environment for all people of Kosovo, and facilitate the safe return of displaced persons and refugees. KFOR and its international personnel are not subject to the authority of UNMIK, and enjoy immunity from the Kosovo courts.

The law applicable in Kosovo is composed of UNMIK Regulations and subsidiary instruments, and the law that was in force in Kosovo on March 22, 1989—a date considered to be the last day on which Kosovo enjoyed autonomy within the Socialist Federal Republic of Yugoslavia (SFRY).² This body of law includes the federal provisions of the former Socialist Federal Republic of Yugoslavia (SFRY), Kosovo’s former provincial law, as well as some provisions of the law of the former Socialist Republic of Serbia. Law applicable in Kosovo *after* 1989 may be applied only if it addresses a subject matter or situation not covered by the prior law. UNMIK Regulations and subsidiary instruments take precedence over any prior laws.

UNMIK has gradually handed over many of its authorities to local bodies. In early 2001, in agreement with local political leaders, UNMIK formed twenty central administrative departments, *qua* ministries, which were at least in name jointly led by national and international co-heads. Local elections in October 2000 led to the establishment of thirty municipal assemblies throughout Kosovo. In mid-2001, an expert working group with international and national members drafted a Constitutional Framework for the handover of many central government functions to the people of Kosovo. The Framework and subsidiary legislation provides for an Assembly, Prime Minister, and President of Kosovo, as well as ten central government ministries. Central elections in November 2001 resulted in the formation of a 120-member Assembly. In

¹ UNMIK created the new Police and Justice Pillar in May 2001 to increase efforts to address the law and order problem in Kosovo. These functions previously fell within the broad mandate of the UN Civil Administration Pillar. The original UNMIK Pillar I was a Humanitarian Affairs Pillar run by the Office of the UN High Commissioner for Refugees (UNHCR). Although UNHCR separated from UNMIK in the year 2000, its humanitarian efforts in Kosovo continue.

² In its first regulation, UNMIK had determined, among other things, that the law applicable in Kosovo on March 24, 1999—the first day of the NATO air campaign—would continue in force in Kosovo, to the extent that such provisions were not discriminatory or violative of international human rights standards. In response to local political pressure, UNMIK later reversed course and determined that the law in force on March 22, 1989 should instead be used. See Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22:1 MICH. J. INT’L L. 1, 4-6.



March 2002, after months of difficulty forming a coalition, the two largest parties were able to elect a Prime Minister and President and eventually form a government.

Notwithstanding the hand-over of authorities to local actors, the SRSG has retained broad powers and enjoys ultimate legislative and executive authority to ensure that Security Council Resolution 1244 is fully implemented. In particular, the SRSG has retained executive functions in the areas of law enforcement and justice. With no ministry of justice among the ten Kosovo-led ministries, the tasks of a traditional justice ministry are divided between the internationally-run UNMIK Pillar I Department of Justice (DOJ)³ and the Kosovo-led Ministry of Public Services.

History of the Judiciary

Kosovo shares the legal tradition of the former SFRY, including its strong influences from the Austro-Hungarian Empire. Under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia, Kosovo enjoyed the status of an “autonomous province” within the SFRY and, as such, enjoyed substantial sovereign rights. While both the 1974 Constitution of the Socialist Autonomous Province of Kosovo and the SFRY Constitution include the autonomous province of Kosovo as a constituent part of the Socialist Republic of Serbia, many in Kosovo question, and contest, the legitimacy of the 1945 annexation of Kosovo.

As an autonomous province in the SFRY, Kosovo had a Parliament, a court system, a Supreme Court, and a Constitutional Court. It shared federal criminal and civil procedure codes with the rest of the SFRY, but had its own criminal code (augmented by federal and some Serbian criminal provisions). As common in other socialist systems, executive branch and party influence in the judiciary was common.

In 1989, Kosovo’s autonomy was severely restricted, with power over the police, courts, civil defense, and economic, social and educational policy taken by Serbia. Virtually all Kosovo Albanian judges and prosecutors were dismissed from their positions. While some began work as private lawyers, many were forced completely out of the legal profession. In 1992, Serbian authorities ceased administering the Judicial/Bar Examination in Kosovo, thus further restricting the access of Kosovo Albanians to the legal professions. Thanks to the efforts of UNMIK, OSCE, and several international NGOs, the Judicial/Bar Examination resumed in Kosovo on December 14, 2001, and it will be administered every three months.

Following the end of the war in June 1999, court facilities were dilapidated and in a state of severe disrepair. Many who had served in the judiciary during the previous ten years had fled the province. Thus, those legal professionals remaining in Kosovo lacked recent judicial experience and many had been outside the practice of law for a decade. Moreover, the experience from the prior socialist system served as poor preparation for work in the new democracy. Few if any had direct knowledge of modern democratic and international human rights legal standards.



Structure of the Courts

Kosovo’s regular court system is composed of twenty-three Municipal Courts, five District Courts, a Commercial District Court, and the Supreme Court. The minor offenses court system includes twenty-four Municipal Courts of Minor Offenses and the High Court for Minor Offenses. A Special Chamber of the Supreme Court on Constitutional Framework Matters is provided for in the Constitutional Framework, but it has yet to be established.

³ In May 2001, the Pillar I DOJ succeeded the UNMIK Department of Judicial Affairs and the Joint Interim Administrative Structure’s jointly-run Administrative Department of Justice. Following the formation of a Kosovo government in March 2002, certain limited functions in the area of judicial administration were transferred to the Kosovo Ministry of Public Services.

A parallel court run by Kosovo Serbs and supported by Belgrade operates without UNMIK authorization in Zvečan/Zvečan in northern Kosovo. Moreover, some cases within the territorial jurisdiction of Kosovo involving Kosovo Serbs are heard in courts in Serbia proper.

Lay Judges serve alongside professional judges on three- and five-judge panels in the municipal courts and the district courts. Lay judges will also serve on three-judge panels of the economic panel of the Supreme Court, but they have yet to be named. Lay judges have no special legal or other training and have equal votes to those of professional judges.

UNMIK has appointed **International Judges** and prosecutors to district courts throughout Kosovo and to the Supreme Court. The international judges have worked exclusively on criminal cases, dealing primarily with sensitive cases involving alleged war crimes or inter-ethnic violence.

Municipal Courts operate as courts of first instance for criminal offenses punishable with sentences of up to five-years imprisonment, for minor property disputes, inheritance matters, labor relations, and other civil matters.

District Courts hear appeals from the decisions of the municipal courts. They also serve as courts of first instance for criminal offenses punishable by sentences of more than five years, major property disputes, copyright disputes, suits for the protection of inventions, and other enumerated matters. The **Commercial District Court** has jurisdiction over economic disputes and economic offenses.

The **Supreme Court of Kosovo** operates as a court of cassation in some cases, hears direct appeals from cases originating in the district courts, serves as a court of first instance in some matters, and it will have a special chamber to address conflicts between laws passed by the Assembly and the Constitutional Framework.

Minor Offenses Courts within the municipalities have jurisdiction over minor offenses, which are punishable by fine or imprisonment of no longer than sixty days. Decisions of the minor offenses courts are taken to a single **High Court of Minor Offenses**, which has territorial jurisdiction covering all of Kosovo.

Conditions of Judicial Service

Qualifications

To be appointed as a professional judge in the High Court for Minor Offenses, municipal courts, district courts, commercial court, or Supreme Court, a candidate must: (1) have a university degree in law; (2) have passed the examination for candidates to the judiciary (Judicial/Bar Examination); (3) have high moral integrity; (4) not have been actively engaged in discriminatory practices; and (5) not have a criminal record. In addition, applicants must have the following prerequisite work experience in the field of law: three years to sit on the High Court of Minor Offenses or municipal court; seven years to sit on the district court; and four years to sit on the commercial court. The experience required for appointment as a judge of the Supreme Court is not specified in the relevant UNMIK regulation.

Applicants for judgeships in the minor offenses courts must meet the above criteria, with two exceptions. First, they must have passed a professional examination for minor offenses court judges (Professional Examination) rather than the Judicial/Bar Examination, and second, they are not required to have additional experience in the practice of law (other than the one year of experience required to sit for the Professional Examination).

A new draft regulation would modify these requirements and establish a mandatory program of pre-appointment training at the Kosovo Judicial Institute (KJI). Under the draft regulation, those



interested in becoming a judge (or prosecutor) would first need to pass the Judicial/Bar Examination. To sit for the Judicial/Bar Examination, one must graduate from law school and work one year “in a regular court, public prosecutor’s office, public attorney’s office . . . or in a lawyer’s office” or two years “in other government organs.” After passing the Judicial/Bar Examination, candidates could then apply to the KJI training program by submitting to a written and oral entrance examination. Those admitted would receive at least four months of classroom training at the KJI and two months of hands-on training in the courts. The Kosovo Judicial and Prosecutorial Council (KJPC) would then recommend KJI graduates to the SRSG for appointment as judges (and prosecutors).

To serve as a lay judge one must: (1) be at least twenty-five years old; (2) have high moral integrity; and (3) not have a criminal record. In addition, if the lay judge will be involved in adjudicating actions involving juveniles, the candidate must have “professional qualifications and/or experience involving juveniles.”

International judges must have: (1) a university degree in law; (2) five years service as a judge or prosecutor in their own country; (3) high moral integrity; and (4) not have a criminal record.

Appointment and Tenure

The KJPC recommends professional judges, lay judges, and prosecutors for appointment to the SRSG. The SRSG makes final appointments from lists of candidates “proposed by the KJPC and endorsed by the Assembly.” While earlier terms of appointment were very short, as of January 2002, judicial appointments are made to the end of the UNMIK Mission in Kosovo.

International judges are selected through the UNMIK staff recruiting process without KJPC involvement. They are appointed by the SRSG for six-month renewable terms.

Training

After the 1989 usurpation of Kosovo’s autonomy, most, if not all, Kosovo Albanians either withdrew, or were forced, from the Pristina Law Faculty; instead, they participated in a shadow educational system run by Kosovo Albanian professors and legal professionals in their homes. This home-based system of legal education was substandard at best, and it is widely acknowledged that this generation received a less than adequate legal education under the trying circumstances of the period. While Kosovo Albanians have now returned to the Law Faculty, Kosovo Serbs (largely confined to areas of northern Kosovo and to KFOR-protected enclaves elsewhere) are unable to attend the Pristina Law Faculty because of a lack of security and language barriers. Kosovo Serbs wishing to finish or commence a legal degree program in their own language would do so in the Serb University operating in North Mitrovica (which does not teach Kosovo’s applicable law), in Belgrade, or perhaps in other former republics of the SFRY.

While significant improvements at the Pristina Law Faculty have been taking place under the UNMIK administration, all respondents discussing the matter indicated that additional reforms are sorely needed. In particular, respondents highlighted the need to make the education at the Law Faculty more oriented towards practical skills.

The OSCE-supported KJI—as well as the Council of Europe, ABA/CEELI and other partners—have provided numerous seminar type training activities for judges and prosecutors since September of 1999. Training has covered a variety of topics and has focused on criminal procedure and the introduction of international human rights standards. While the seminars are generally well-attended and appreciated, they are not mandatory for sitting judges.



Assessment Team

The Kosovo JRI 2002 Analysis assessment team was led by Robert Pulver and benefited in substantial part from the efforts of Gentian Gura, Jehona Hyseni, and the rest of the ABA/CEELI-Kosovo staff. ABA/CEELI staff members Scott Carlson, Greg Gisvold, and Sarah Churchill served as editors. The conclusions and analyses are based on interviews that were conducted in Kosovo during January and February of 2002, later telephonic interviews, and relevant documents reviewed. Records of relevant authorities and individuals interviewed are on file with ABA/CEELI.



Kosovo JRI 2002 Analysis

The Kosovo JRI 2002 Analysis reveals a judicial system suffering from a decade or more of repression, the scars of war, and ongoing ethnic conflict. When UNMIK and KFOR arrived following the end of the NATO air campaign, there were no functioning courts and virtually no current judges remaining in Kosovo. Most of those qualified to apply for positions as judges had not served in that capacity for more than ten years, and many had not worked in any legal profession for just as long. For the first few months, even the most basic supplies—such as paper and heaters—were lacking. Moreover, ethnic tensions and bias clouded the functioning of the courts, and social pressures made it difficult for local judges to remain neutral in inter-ethnic cases.

Thus, while national and international actors are to be heartily congratulated for the rapid rebuilding of a functioning judicial system from next to nothing, it is no surprise that almost all JRI reform factors show negative or neutral correlations. Furthermore, it should be stressed that many of the factor correlations reflect the unique role of the international administration responsible for Kosovo under UN Security Council Resolution 1244, or are simply the result of the continued application of outdated laws and procedures from the socialist era.

While the factor correlations may provide a sense of the relative gravity of certain issues, ABA/CEELI stresses that the factor correlations noted herein possess their greatest utility when viewed in conjunction with the underlying analyses. In this regard, ABA/CEELI invites comments and information that would enable it to develop better or more detailed responses in future JRI assessments. ABA/CEELI views the JRI assessment process to be part of an ongoing effort to monitor, evaluate, and ameliorate reform efforts.

Table of Factor Correlations

I. Quality, Education, and Diversity		
Factor 1	Judicial Qualification and Preparation	Neutral
Factor 2	Selection/Appointment Process	Neutral
Factor 3	Continuing Legal Education	Neutral
Factor 4	Minority and Gender Representation	Negative
II. Judicial Powers		
Factor 5	Judicial Review of Legislation	Negative
Factor 6	Judicial Oversight of Administrative Practice	Negative
Factor 7	Judicial Jurisdiction over Civil Liberties	Negative
Factor 8	System of Appellate Review	Neutral
Factor 9	Contempt/Subpoena/Enforcement	Negative
III. Financial Resources		
Factor 10	Budgetary Input	Negative
Factor 11	Adequacy of Judicial Salaries	Negative
Factor 12	Judicial Buildings	Neutral
Factor 13	Judicial Security	Negative
IV. Structural Safeguards		
Factor 14	Guaranteed Tenure	Neutral
Factor 15	Objective Judicial Advancement Criteria	Neutral
Factor 16	Judicial Immunity for Official Actions	Neutral
Factor 17	Removal and Discipline of Judges	Neutral
Factor 18	Case Assignment	Negative
Factor 19	Judicial Associations	Neutral

V. Accountability and Transparency		
Factor 20	Judicial Decisions and Improper Influence	Negative
Factor 21	Code of Ethics	Neutral
Factor 22	Judicial Conduct Complaint Process	Neutral
Factor 23	Public and Media Access to Proceedings	Positive
Factor 24	Publication of Judicial Decisions	Negative
Factor 25	Maintenance of Trial Records	Negative
VI. Efficiency		
Factor 26	Court Support Staff	Negative
Factor 27	Judicial Positions	Neutral
Factor 28	Case Filing and Tracking Systems	Neutral
Factor 29	Computers and Office Equipment	Neutral
Factor 30	Distribution and Indexing of Current Law	Negative



I. Quality, Education, and Diversity

Factor 1: Judicial Qualification and Preparation

Judges have formal university-level legal training and have practiced before tribunals or, before taking the bench, are required (without cost to the judges) to take relevant courses concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity.

Conclusion	Correlation: <i>Neutral</i>
University-level legal education is required of all professional judges, but there is no requirement that they practice before tribunals before taking the bench. A new draft law envisages that future judicial candidates undergo classroom training and practical training in the courts before being appointed. Lay judges are not required to have any particular training or background.	

Analysis/Background:

All professional judges must have formal university-level legal training before taking the bench. See UNMIK REGULATION NO. 2001/8 ON ESTABLISHMENT OF THE KOSOVO JUDICIAL AND PROSECUTORIAL COUNCIL § 6.1, UN DOC. UNMIK/REG/2001/8, (___ O.G. ___ UNMIK CITE)⁴ [hereinafter REG/2001/8 ON THE KJPC]. It was widely acknowledged that the home-based training provided to Kosovo Albanian law students under the shadow law faculty in the 1990s was substandard. With the help of the Kosovo Law Centre (an NGO that receives administrative support from the OSCE and funding support from a variety of international donors) and the Department of Education, reforms have begun at the Pristina Law Faculty. Respondents nevertheless stressed that the program still does not adequately prepare students for their legal careers. Additional training in practical legal skills—such as legal reasoning, legal writing, and how to question witnesses—is needed. Moreover, the school should consider the use of blind-graded written exams, in addition to the current practice of oral examination.

All applicants wishing to join the judiciary must have work experience in the field of law. Three years of experience is required for the High Court of Minor Offenses or municipal courts. Seven years is required for candidates to the district courts. Four years of legal experience is needed to become a judge of the commercial court. *Id.* § 6.2. The experience required to qualify as a judge of the Supreme Court is not specified in the regulation, but appointees must have had one or two years experience in order to take the Judicial/Bar Examination. See LAW ON THE JUDICIAL EXAMINATION art. 2, O.G. SAP KOS. 10/77 [hereinafter LAW ON THE JUDICIAL EXAM]. Similarly, the UNMIK regulation does not require a particular level of experience of minor offense court judges, but judges of those courts must have had at least one year legal experience before taking the Professional Examination for Minor Offenses Courts. While various levels of work experience are required for professional judges, there is no requirement that the experience include practice before tribunals. Nevertheless, most all of those appointed to the bench under the UNMIK administration had in fact served as judges or prosecutors in the past.

A new draft UNMIK regulation would modify the way judges are appointed and would make pre-appointment training mandatory. See *Draft UNMIK Regulation On the Selection and Training of Judges and Public Prosecutors in Kosovo* (Draft of January 2002) [hereinafter *Draft Regulation on the KJ*]. Under this regulation, if enacted, candidates who have passed the Judicial/Bar Examination and who are otherwise eligible for judicial posts would sit for a competitive written

⁴ Because the UNMIK Official Gazette has not been distributed for the year 2001, citations to the Gazette are not available.

and oral examination for entrance into the judicial training program. *Id.* Those who enter the program would receive at least four months of training at the Kosovo Judicial Institute. Courses would include: Legal Research; Legal Reasoning; Professional Ethics; and Technical Knowledge. The Technical Knowledge training would involve: conducting investigations; the relationship between the prosecutor, police and investigating judge; questioning witnesses; the indictment; forensic matters; the role of the judge at trial; and drafting decisions, orders and verdicts. *Id.* §§ 8.1, 8.2. Following the classroom training, candidates would receive two months of hands-on training in the courts. *Id.* § 9.1. Following completion of the program, the KJI would provide a final evaluation of each candidate to the KJPC for consideration. *Id.* § 11.1. Based on the evaluation, the KJPC would recommend candidates for appointment. *Id.* § 23. The SRSG would then make appointments from lists of candidates recommended by the KJPC and endorsed by Assembly. See UNMIK REGULATION No. 2001/9 ON A CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT IN KOSOVO § 9.4.8., UN DOC. UNMIK/REG/2001/9, (___ O.G. ___ UNMIK CITE) [hereinafter CONST. FRAMEWORK].

While the development of the KJI into a pre-appointment judicial training program is a positive step, the training periods envisaged in the draft regulation (four months course work and two months hands-on training) are probably not sufficient to prepare a new judge, particularly given the admitted weaknesses in the university-level legal education program over the last decade. The periods of classroom work and training in the courts should be increased.

With the exception of lay judges who work on juvenile cases, lay judges are not required to have any particular training or background. Those who work on juvenile cases must have “professional qualifications and/or experience involving juveniles” before they are appointed. REG/2001/8 ON THE KJPC § 6.3. One respondent observed that some training of lay judges on basic legal issues and procedure would enhance their ability to do their jobs in an effective and independent manner.

International judges have passed through the respective educational requirements in their home countries and have a minimum of five years judicial experience before serving as international judges in Kosovo. UNMIK REGULATION NO. 2001/2 AMENDING UNMIK REGULATION NO. 2000/6, AS AMENDED [BY REG/2000/34], ON THE APPOINTMENT AND REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS § 2, UN DOC. UNMIK/REG/2001/2, (___ O.G. ___ UNMIK CITE) [hereinafter REG/2001/2 ON THE APPOINTMENT AND REMOVAL OF INTERNATIONAL JUDGES AND PROSECUTORS]. They do not undergo any special training on the legal system in Kosovo before assuming their positions. Respondents identified this as a significant weakness in the current system.

Factor 2: Selection/Appointment Process

Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system should foster the selection of independent, impartial judges.

<u>Conclusion</u>	<u>Correlation: Neutral</u>
The appointment of professional judges has been based primarily on the candidate having had some prior judicial experience, without a full assessment of the judges' prior performance. If adopted, the new system for selection and training of judges will add additional objective criteria to the selection process.	



Analysis/Background:

The appointment of professional and lay judges operates in virtually the same manner. After announcing openings in the judiciary, the KJPC reviews applications and council members conduct short interviews of the applicants who meet the minimum criteria (see above under Factor One). In conducting interviews, interview committees “must evaluate the professional and personal qualities of candidates impartially and fairly, respecting their goal of enhancing the development of an independent multi-ethnic judiciary in Kosovo.” INTERNAL RULES OF PROCEDURE OF THE KOSOVO JUDICIAL AND PROSECUTORIAL COUNCIL art. 37 (unpublished rules available from the KJPC) [hereinafter KJPC INTERNAL RULES]. The KJPC then reaches a determination on each applicant based on the information from the application and interviews. In addition, while the KJPC is empowered to seek the opinion of judicial and prosecutorial authorities regarding the candidates, the power is rarely, if ever, used. See *id.* at art. 36(b). In making its determinations, the KJPC is to be “guided by UNMIK’s goal to establish a professional, independent, impartial and multi-ethnic judiciary.” REG/2001/8 ON THE KJPC § 5.2.

The KJPC then makes non-binding recommendations to the SRSG, who makes appointments from lists of candidates recommended by the KJPC and endorsed by the Assembly. CONST. FRAMEWORK § 9.4.8.

Thus far, the KJPC and its predecessor councils which were charged by UNMIK with recommending judicial appointments (the Joint Administrative Council on Emergency Judicial Appointments and the Advisory Judicial Commission) have focused efforts on recommending candidates with some prior judicial experience. Several respondents complained that this criterion led to the appointment of many unqualified judges—those who had served before, but who lacked the competence required to do the job.

The KJPC and prior bodies charged with recommending judicial appointments lacked human resources, data on prior judicial performance, and time to fully consider applications; accordingly, prior appointments to the judiciary in Kosovo were often made without a full evaluation of the candidates’ professional merits. Similarly, the process for reappointing judges upon the termination of their terms has often been hurried, leaving little opportunity to fully evaluate their performance before reappointment. Some outside the KJPC have complained that they have not had the opportunity to comment on applications, before or after their recommendation to the SRSG. Finally, with very few candidates meeting the basic requirements for appointment (including having passed the Judicial/Bar Examination), the KJPC and its predecessors had little opportunity to be selective in its recommendations. The latter problem will be ameliorated to some degree by the regular administration of the Judicial/Bar Examination in Kosovo—a practice UNMIK, OSCE and several international NGOs recently resumed after a ten-year hiatus under Serbian authority. The exam will be offered every three months. Cf. OSCE MISSION IN KOSOVO PRESS RELEASE, *Kosovo Bar Exam Resumes, Ten Years On* (October 18, 2001).

The Draft Regulation on the Selection and Training of Judges would require all candidates to pass a written and oral examination for admission into the KJI training program. Only upon successful completion of the KJI program and training in the courts, would an applicant be eligible for appointment. This new process would introduce additional objective factors in the selection process. Moreover, the new role of the Assembly in the appointment process should open judicial appointments more to the public view, and it would allow additional commentary by those outside the KJPC.

Factor 3: Continuing Legal Education

Judges must undergo, on a regular basis and without cost to them, professionally prepared continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and developments in the law.

Conclusion	Correlation: <i>Neutral</i>
<p>An expansive program of continuing legal education has been provided to judges and prosecutors. Continuing legal education programs are generally well attended, but sometimes lack practicality and are not mandatory. Additional in-depth training on practical skills, new laws, and applicable international standards is needed.</p>	

Analysis/Background:

The Kosovo Judicial Institute was founded by OSCE and implementing partners to serve as an institute for judicial training. ABA/CEELI, the Council of Europe, and others have worked actively, both in conjunction with the KJI and on their own, to provide a range of training seminars on a variety of topics including criminal law and procedure, the law applicable in Kosovo, war crimes, the European Convention on Human Rights, domestic violence, and trafficking, to name but a few. Respondents were highly complementary of seminars that involved active participation and interactive learning techniques, and they were critical of those that employed the standard lecture format. Some respondents felt that the seminars should more directly address concrete problems or issues faced by judges in their everyday practice, rather than focusing on general themes. Others felt that more specialized seminars should be provided for judges who face particular types of cases. Finally, some stressed the need for hands-on training on judicial skills, such as decision writing and the examination of witnesses.

Seminars are donor funded and are provided to the participants free of charge. The topics addressed have been based on the needs identified by the judges themselves, or they have been driven by the training a particular donor feels is needed. The National Co-Director and International Co-Director of the KJI—both judges themselves—are responsible for establishing the curriculum and have developed their programs with significant input from other judges.

While it is envisaged that the KJI will turn its primary efforts to the training of aspiring judges and prosecutors, it is crucial that it continue its program of training for sitting judges and that such training be made mandatory for some subjects (such as ethics). The need for continuing training of sitting judges was identified by respondents as one of the most important issues for the judiciary in Kosovo. Many pointed out the lack of recent experience of Kosovo's judges and said that, in some instances, the judicial staff are poorly suited to perform their functions. Several respondents observed that some court decisions are poorly written and not-well reasoned.

A practically-oriented and mandatory program of continuing judicial education is particularly necessary given many judges' lack of recent experience, and the complexity of the law that now applies in Kosovo. Applicable law includes: UNMIK Regulations and subsidiary instruments; international instruments incorporated by reference in the Constitutional Framework; the law that was in force in Kosovo on March 22, 1989; and law that applied in Kosovo after 1989 if it addresses a subject matter or situation not covered by the prior law. See UNMIK REGULATION No. 1999/24 ON THE LAW APPLICABLE IN KOSOVO, UN Doc. UNMIK/REG/1999/24, 1999:2 O.G. 370-72, *as amended by* UNMIK REGULATION No. 2000/59, UN Doc. UNMIK/REG/2000/59, 2000:5 O.G. 171-173; UNMIK REGULATION No. 1999/1 ON THE AUTHORITY OF THE INTERIM ADMINISTRATION IN KOSOVO, UN Doc. UNMIK/REG/1999/1, 1999:1 O.G. 1-3, *as amended by*



UNMIK REGULATION NO. 1999/25, UN Doc. UNMIK/REG/1999/25, 1999:2 O.G. 379, and UNMIK REGULATION NO. 2000/54, UN Doc. UNMIK/REG/2000/54, 2000:4 O.G. 821-823. New UNMIK regulations frequently introduce standards that have not been applied before in Kosovo. Applying this complex and growing body of law requires continuing theoretical and practical training for both new and sitting judges.

Factor 4: Minority and Gender Representation

Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.

Conclusion	Correlation: Negative
The pool of applicants and group of appointees does not adequately reflect Kosovo's ethnic/religious diversity, and women are underrepresented. International actors have consistently attempted to include minorities in the judiciary, but security and political considerations have restricted participation by some groups.	

Analysis/Background:

While not completely reliable, the 1991 census indicated that approximately 82% of the population in Kosovo was Albanian, 10% Serb, 3% Muslim Slav (Bosniak), 2% Roma, and less than 1% Turk. Another 2% fell into other groups (Montenegrin, Croat, or other). The census does not appear to have distinguished among Roma, Ashkali, and Egyptians, nor do there appear to be separate figures for the Gorani minority. See THE WORLD BANK, CONFLICT AND CHANGE IN KOSOVO: IMPACT ON INSTITUTIONS AND SOCIETY 9 (December 2000). Since that time, the numbers of minorities in Kosovo has decreased, but precise population figures are not available.

Religion and ethnicity in Kosovo are extremely closely intertwined, with Kosovo Serbs identifying with the Serbian Orthodox Church and the vast majority of Kosovo Albanians being Muslim. See U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2001, FEDERAL REPUBLIC OF YUGOSLAVIA 30. Out of 297 professional judges sworn in as of January 18, 2002, 278 were Kosovo Albanians, 3 Kosovo Serbs, 6 Turks, 8 Muslim Slavs (Bosniak), and 2 Roma. *UNMIK Pillar I, Department of Justice* (informal data on judges and prosecutors having taken the oath of office) (February 13, 2002). The ethnic make up at the various levels of the court system is not evident from the data gathered — nor were figures immediately available regarding the ethnicity of the pool of applicants for judge or lay judge positions, or of the lay judges that have been appointed. *Id.* Nevertheless, national and international respondents alike stressed the need for greater ethnic diversity in the judiciary, and in particular, they highlighted the need for increased participation by Kosovo Serbs. While political considerations and orders from Belgrade during the time of Milosevic prevented Kosovo Serbs from serving in the judiciary after the war, the way now appears to have been cleared for their greater participation, if sufficient security can be provided.

Unlike some other parts of the former SFRY, women are dramatically underrepresented at every level of the court system. Only sixty-four of 297 professional judges are women.⁵ Two of twelve judges on the Supreme Court, one of five judges on the High Court for Minor Offenses, and five of ten judges on the commercial court are women. There are only five women appointed to the

⁵ Of these, two judges are appointed to the bench, but serve instead at the Kosovo Judicial Institute (KJI). Numbers cited are inclusive of judges serving at the KJI.

five district courts. Twenty-six women are currently appointed as professional judges in the twenty-three municipal courts of Kosovo, and twenty-five sit on the courts of minor offenses. *UNMIK Pillar I, Department of Justice* (informal data on female judges and prosecutors having taken the oath of office) (February 13, 2002). Women are said to make up roughly one-third of the applicants for judicial seats. Lay judges are primarily male retirees, but statistics regarding the gender make up of appointed lay judges are not available. The lack of participation by women in the judiciary appears to be the result of a low number of female candidates with the required qualifications (including the Judicial/Bar Examination) applying for the posts.

II. Judicial Powers

Factor 5: Judicial Review of Legislation



A judicial organ has the power to determine the ultimate constitutionality of legislation and official acts, and such decisions are enforced.

<i>Conclusion</i>	<i>Correlation: Negative</i>
No judicial organ has the authority to review UNMIK regulations or subsidiary instruments for legality or constitutionality. A special chamber of the Supreme Court will be established to assess the compatibility of laws from the Assembly with the Constitutional Framework and with applicable international human rights standards.	

Analysis/Background:

While portions of the 1974 SFRY Constitution and the 1974 Kosovo Constitution might theoretically form part of the body of law applicable in Kosovo, for all practical purposes Kosovo's only documents of quasi-constitutional character are UN Security Council Resolution 1244 and the Constitutional Framework. See UN SECURITY COUNCIL RESOLUTION 1244, UNSC 4011th Sess., UN Doc. S/RES/1244 (1999). The Constitutional Framework incorporates by reference and makes directly applicable in Kosovo the European Convention on Human Rights and its protocols, the International Covenant on Civil and Political Rights, as well as other international instruments. CONST. FRAMEWORK ch. 3. Nevertheless, because of the unique status of UNMIK as the administrator of Kosovo, there is no judicial body in Kosovo with express authority to review the constitutionality or legality of UNMIK regulations or subsidiary instruments.

The Constitutional framework provides for a Special Chamber of the Supreme Court on Constitutional Framework Matters. CONST. FRAMEWORK § 9.4.11. The Special Chamber will have jurisdiction to determine "whether any law adopted by the Assembly is incompatible with this Constitutional Framework, including the international legal instruments specified in Chapter 3 on Human Rights." *Id.* The President of Kosovo, any member of the Presidency of the Assembly, any Assembly Committee, no fewer than five members of the Assembly, or the Government may bring such a challenge. *Id.* An individual does not have standing to initiate a constitutional challenge.

The Special Chamber of the Supreme Court also has jurisdiction over disputes between and among Provisional Institutions of Self Government, over acts that infringe on the independence of independent bodies, and it has jurisdiction to determine whether an action of an official within the executive or legislative branches of the Provisional Institutions of Self Government constitutes an official act covered by immunity. As of the end of February 2002, the Assembly had not passed any laws and the Special Chamber had yet to be established.



Factor 6: Judicial Oversight of Administrative Practice

The judiciary has the power to review administrative acts and to compel the government to act where a legal duty to act exists.

Conclusion	Correlation: Negative
While the judiciary has authority to review administrative decisions of the local government and of Kosovo's other self-governing institutions, the decisions of the international administration remain largely beyond judicial review.	

Analysis/Background:

In principle, the courts have jurisdiction to review administrative decisions and to annul or declare such decisions invalid. See LAW ON ADMINISTRATIVE LAWSUITS, O.G.S.F.R.Y 4/77; LAW ON GENERAL ADMINISTRATIVE PROCEDURE, O.G.S.F.R.Y 585/86. Generally, citizens must exhaust two rounds of administrative review before filing an "administrative lawsuit" seeking judicial relief. LAW ON ADMINISTRATIVE LAWSUITS art. 7. The Administrative Panel of the Supreme Court "decides on the legality of a final administrative enactment in an administrative contest." LAW ON THE REGULAR COURTS art. 30(5), O.G. SAP Kos. 21/78, *as amended by* O.G. SAP Kos. 49/79, 44/82, 44/84, 18/87, 14/88, 2/89 [hereinafter LAW ON THE REGULAR COURTS]. Administrative actions that violate constitutional freedoms and rights are to be heard by three-judge panels of the district courts. See LAW ON THE REGULAR COURTS art. 29(8); LAW ON ADMINISTRATIVE LAWSUITS arts. 66, 70. The judiciary has the power to compel administrative bodies to act where a legal duty exists. See, e.g., LAW ON ADMINISTRATIVE LAWSUITS arts. 42, 62-65. Most respondents generally felt that citizens were aware of their right to seek judicial review in administrative matters, but they are uncertain whether and to what extent such rights are still available under the international administration.

The Constitutional Framework makes clear that administrative decisions of the executive branch of Kosovo's Provisional Self-Governing Institutions may be challenged in the courts after the exhaustion of administrative remedies. "Each person claiming to have been directly and adversely affected by a decision of the Government or an executive agency under the responsibility of the Government shall have the right to judicial review of the legality of that decision after exhausting all avenues for administrative review." CONST. FRAMEWORK § 9.4.2

However, there is little administrative review, and no effective judicial review, of the actions of the international administration. Some respondents felt that courts would reject, or simply not act on, lawsuits regarding the actions of the international administration. Moreover, if such lawsuits are entertained, UNMIK would likely assert immunity from legal process. As provided by UNMIK regulation, "UNMIK, its property, funds and assets shall be immune from any legal process." UNMIK REGULATION No. 2000/47 ON THE STATUS, PRIVILEGES AND IMMUNITIES OF KFOR AND UNMIK AND THEIR PERSONNEL IN KOSOVO, UN DOC. UNMIK/REG/2000/47, 2000:4 O.G. 727-730, [hereinafter REG/2000/47 ON IMMUNITY OF KFOR AND UNMIK]. It appears that UNMIK interprets this immunity even to prevent judicial review of its administrative decisions when it is acting in a governmental capacity. In one well known case, the UNMIK Department of Education stressed that it would have immunity from a suit challenging the fairness of a competition held to employ a local educational director. See OMBUDSPERSON INSTITUTION IN KOSOVO, *Elife Murseli Against the United Nations Mission in Kosovo*, Regist. No. 122/01 (December 2001). As a result, there is currently no effective judicial review of UNMIK's administrative decisions.⁶

⁶ Pursuant to its mandate to protect and promote human rights in Kosovo, the OSCE Department of Human Rights and Rule of Law monitors judicial proceedings and issues periodic reports on its observations. In its most recent report, the OSCE recommended "the amendment of UNMIK

Factor 7: Judicial Jurisdiction over Civil Liberties

The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.

Conclusion	Correlation: Negative
The actions of UNMIK and KFOR cannot be challenged effectively in the Kosovo courts. The court system has jurisdiction over other cases involving human rights and freedoms, but Kosovo judges are not well-versed in the applicable international human rights standards.	

Analysis/Background:

Chapter 3 of the Constitutional Framework provides that “[a]ll persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms.” CONST. FRAMEWORK § 3.1. The Framework incorporates by reference and makes directly applicable in Kosovo the rights and freedoms enumerated in: The Universal Declaration on Human Rights; The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR); The International Covenant on Civil and Political Rights and the Protocols thereto (ICCPR); The Convention on the Elimination of All Forms of Racial Discrimination; The Convention on the Elimination of All Forms of Discrimination Against Women; The Convention on the Rights of the Child; The European Charter for Regional or Minority Languages; and The Council of Europe’s Framework Convention for the Protection of National Minorities. CONST. FRAMEWORK §§ 3.2, 3.3. The Constitutional Framework also provides for the right of all refugees and displaced persons to return to their homes. *Id.* § 3.4.

Nonetheless, particularly outside the context of a criminal case, courts are ill-equipped to handle cases based on the protections found in international instruments. Courts in Kosovo lack a tradition of human rights protection, and—while judges have received training in Articles 5 and 6 of the ECHR—they remain unfamiliar with many other of the now-applicable human rights standards. Moreover, none of the international instruments incorporated by reference into the Constitutional Framework have been published in the Official Gazette, and few, if any, have been directly provided to all sitting judges in local languages. Finally, even if the courts were well-versed in the international instruments incorporated in the Constitutional Framework, most citizens are not prepared to assert such rights in court.

International judges are much more likely to base decisions on the ECHR and other international standards than are their Kosovo counterparts. Where national and international judges work together on court panels in criminal cases, international judges are able to share some of their knowledge of international standards and practices with the Kosovo judges. However, outside the context of criminal cases there are fewer opportunities for such direct transfer of knowledge.

Despite the direct applicability of human rights protections in Kosovo, both UNMIK and KFOR assert immunity from legal process. See REG/2000/47 ON IMMUNITY OF KFOR AND UNMIK §§ 2, 3. While human rights monitors have reported alleged human rights violations by KFOR and UN Civil Police, for the most part there is no judicial remedy for such violations. In this regard, the Kosovo Ombudsperson has, for example, recently criticized the lack of a judicial remedy in the

Regulation 2000/47, to allow local courts to review and decide on. . . administrative actions or decisions of the UNMIK authorities.” OSCE DEPARTMENT OF HUMAN RIGHTS AND RULE OF LAW, *Kosovo Review of the Criminal Justice System (September 2001 – February 2002)* 43 [hereinafter *OSCE Judicial System Review (September 2001 – February 2002)*].




case of admitted ill-treatment of a detainee by a UN Civil Police Officer.⁷ See OMBUDSPERSON INSTITUTION IN KOSOVO, *Hamdi Rashica against The United Nations Mission in Kosovo*, Regist. No. 52/01 (October 31, 2001).

The lack of a judicial remedy is particularly problematic in cases involving the extra-judicial detention of individuals by UNMIK and KFOR. As discussed further below under Factor 8, the SRSG has issued Executive Orders of Detention that, for all practical purposes, have been beyond review by the local or international judges on the Kosovo courts. KFOR has also interpreted its authority in Kosovo to include the ability to detain individuals without judicial authorization, when KFOR determines it is necessary to address a “threat to KFOR” or to provide a “safe and secure environment in Kosovo.” COMMAND KFOR DETENTION DIRECTIVE 42-1, LEGAD, KFOR DIR 42 (October 9, 2001). Although KFOR has determined only to use this authority “as a last resort where civil authorities are unable to take action addressing the threat to KFOR or the safe and secure environment in Kosovo,” these KFOR military detentions cannot be challenged effectively in the courts. See *Id.* at 42-2. Thus, because of the extraordinary powers and immunity asserted by UNMIK and KFOR, there is no effective domestic judicial remedy for most alleged human rights violations by the international civil and security presences.

Factor 8: System of Appellate Review

Judicial decisions may be reversed only through the judicial appellate process.

Conclusion	Correlation: Neutral
While for the most part judicial decisions may only be reversed through the appellate process, the SRSG has in the past issued executive orders of detention that effectively overruled  orders.	

Analysis/Background:

The principle that judicial decisions may only be reversed by higher judicial bodies is well-understood and is, for the most part, respected in practice. However, respondents pointed to several instances in which the judiciary had ordered a criminal suspect released from pretrial detention, only to have the judicial order effectively overridden by an executive order of the SRSG. After strong objections to this practice from the Kosovo Ombudsperson, the OSCE, and others, it appears that the SRSG has stopped this practice.⁸ See, e.g., OMBUDSPERSON INSTITUTION IN KOSOVO, *Cele Gashi against UNMIK*, Regist. No. 256/01 (September 12, 2001); OMBUDSPERSON INSTITUTION OF KOSOVO, *Special Report No. 3. On the Conformity of Deprivations of Liberty Under ‘Executive Orders’ with Recognized International Human Rights Standards* (June 29, 2001). Also in response to the Ombudsperson’s and others’ complaints, the SRSG established a special commission for the review of extra-judicial detentions based on executive orders. See UNMIK REGULATION No. 2001/18 ON THE ESTABLISHMENT OF A DETENTION REVIEW

⁷ The Ombudsperson Institution in Kosovo was established in June 2000 to “promote and protect the rights and freedoms of individuals.” UNMIK REGULATION No. 2000/38 ON THE ESTABLISHMENT OF THE OMBUDSPERSON INSTITUTION IN KOSOVO § 1, UN DOC. UNMIK/REG/2000/38, 2000:2 O.G. 440-446. It has the authority to investigate and report on complaints “concerning human rights violations and actions constituting an abuse of authority by the interim civil administration.” *Id.* § 3.1

⁸ According to the OSCE, “the SRSG has not issued any Executive Orders within the past six months, and that, currently, there are no persons detained on extra-judicial orders.” OSCE *Judicial System Review (September 2001 – February 2002)* at 9.

COMMISSION FOR EXTRA-JUDICIAL DETENTIONS BASED ON EXECUTIVE ORDERS, UN DOC. UNMIK/REG/2001/18, (__ O.G. __ UNMIK CITE) (effective only through 25 November 2001).

While UNMIK extra-judicial detentions appear to have stopped, KFOR continues to detain some suspects in the absence of judicial orders of detention. For the most part, these recent cases have not proceeded to court, and therefore, they typically do not represent a KFOR “overruling” of judicial determinations. Nevertheless, such KFOR detentions remain beyond effective judicial review and control.

Because both KFOR and UNMIK interpret their security and executive powers broadly, it is possible that in the future either would again exercise their authority in such as way as to effectively overrule the final determination of a judicial body.

Factor 9: Contempt/Subpoena/Enforcement

Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of government.

Conclusion	Correlation: Negative
The judiciary has subpoena, contempt, and enforcement powers, but available sanctions are often underutilized.	

Analysis/Background:

The applicable law provides courts with subpoena, contempt and enforcement powers. Courts have authority to summon witnesses. See CODE OF CRIMINAL PROCEDURE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA arts. 120-130 (delivery of writs and summonses); 182-184 (compelling attendance of accused); 230 (witness summons), O.G.S.F.R.Y 4/77 [hereinafter CODE CRIM. PROC.]. See *also* CODE OF CIVIL PROCEDURE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA arts. 114 (summoning parties and participants); 133-149 (serving of writs); 242 (witness subpoenas), O.G.S.F.R.Y 4/77, *as amended by* O.G. 36/80, 69/82 [hereinafter CODE CIV. PROC.]. Regular witnesses who fail to appear may be brought before the court by force and fined. CODE CRIM. PROC. arts. 237, 303; CODE CIV. PROC. arts. 248. Expert witnesses who fail to appear are subject only to a fine. CODE CRIM. PROC. art. 243 and CODE CIV. PROC. art. 255 (expert witnesses subject only to fine). Parties in civil cases cannot be compelled to testify, but a default judgment may be entered where a party fails to appear or fails to refute the claims at issue. CODE CIV. PROC. at arts. 268-269, 291, 332. Courts also have the power to sanction parties, participants, and others present for disruptive conduct. CODE CRIM. PROC. art. 295 (fine and ejection from court for disruptive conduct in criminal case); CODE CIV. PROC. art. 110 (fine or imprisonment in lieu of fine for submission which offends the court or participants); 318 (fine and ejection from courtroom for disrupting work of the court). See *also* CODE CRIM. PROC. art. 78 (fine for offensive statement). Parties or their counsel can be fined for procedural actions which “heavily abuse the rights under this code.” CODE CIV. PROC. art. 316. Those who intentionally delay criminal proceedings may be sanctioned with a fine. SFRY CODE CRIM. PROC. art. 144. The procedure for the enforcement of judgments is fully elaborated in the Law on Executive Procedure. SFRY LAW ON EXECUTIVE PROCEDURE, O.G.S.F.R.Y 20/78, *as amended by* O.G.S.F.R.Y 6/82 and 74/87.

Despite the powers granted in the law, courts are reluctant to use sanctions to curb abuses. Attorneys who file frivolous requests or intentionally delay proceedings are rarely, if ever, sanctioned. One respondent reported observing defense counsel whispering answers into a



witness' ear as he was being questioned in court. Although the conduct was obvious, the judge(s) in the case permitted it to continue.

Courts do use the police to compel witness attendance when necessary. UN Civil Police are said to be very cooperative in attempting to bring witnesses to trial, particularly in criminal cases. The Kosovo Police Service, recently taking over the task in some areas, has been somewhat less effective. Nevertheless, courts are disinclined to sanction witnesses who have failed to appear with available fines. As characterized by one respondent, even if a witness is fined "everyone knows it is just on paper," and the fine will not be collected. The non-attendance of witnesses leads to significant delays in court proceedings.

It was also reported that at trial, or during the investigation, witnesses often recant prior testimony in sensitive cases. Even with two diametrically opposed statements from the same witness, courts rarely, if ever, sanction witnesses for perjury. While criminal penalties for perjury exist, one respondent felt that there is almost complete impunity for perjury in the Kosovo courts.

Specific problems were observed in Serb-dominated areas of northern Kosovo. Citizens in the north are less likely to respect UNMIK's authority, and UNMIK police are therefore much less effective there in serving summonses, compelling witness attendance, and enforcing money judgments. Respondents also reported problems compelling witnesses from Serbia or other countries to attend proceedings in Kosovo.

Criminal cases have by far been the priority in the Kosovo courts. But as more and more civil cases are heard, the problem of the lack of enforcement of civil judgments is growing. The legal procedure for the enforcement of a civil judgment is long and drawn out, with many avenues for delay before a judgment is collected. In addition, while courts have legal authority to seize funds from a judgment debtor's account, banks are said not to obey courts' seizure orders. In addition, courts lack adequate personnel to execute judgments in a consistent and timely fashion. Given that the applicable law on enforcement of civil judgments dates back to the socialist era, there may be a need for reform in the way civil judgments are executed.

The courts' powers are sometimes ineffective with respect to the international civil administration or security presence, both of which regularly assert immunity from legal process. There were several cases in the year 2001 in which prison authorities did not immediately honor valid court orders to release a criminal suspect (and later the SRSG issued an executive order of detention) (see Factor 8 above).

One respondent noted that it was extremely difficult to obtain UNMIK Information Circulars defining court cost provisions in Deutsch Marks, and that court costs are rarely assessed or collected.

Respondents also indicated that prison officials were sometimes not responsive to court orders allowing defense counsel to visit their clients. Prison officials would respond to the defense counsel by saying that visits were not permitted on that particular day, or that only family visits could be accommodated. One respondent said that prison officials would not allow counsel to meet in private with their clients and that the court "did not have the power" to order prison officials to do so.

III. Financial Resources

Factor 10: Budgetary Input

The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches, and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.

Conclusion	Correlation: Negative
The judiciary has limited input into the budgetary process and has little or no direct control over its funds once allocated.	

Analysis/Background:

Thus far, judges have had very limited opportunity for input into the budgetary process in Kosovo. The UNMIK-led Department of Judicial Affairs (DJA) and the Joint Interim Administrative Structure's Administrative Department of Justice (ADoJ), based on input from at least some of the court presidents, prepared prior budgets for the court system and presented budget proposals to the Central Fiscal Authority (CFA). The CFA, working closely with others in the international administration, presented a final Kosovo Consolidated Budget for approval to the SRSG. See UNMIK REGULATION NO. 1999/16 ON THE ESTABLISHMENT OF THE CENTRAL FISCAL AUTHORITY OF KOSOVO AND OTHER RELATED MATTERS, UN DOC. UNMIK/REG/1999/16, 1999:1 O.G. 117-20. While court presidents had the opportunity to express their needs to the DJA and ADoJ, they felt they lacked meaningful input into the process. It does not appear, for example, that in prior years members of the judiciary were involved in the final compilation of the total judiciary budget, nor in budgetary discussions and negotiations with the CFA.

Respondents reported that administrative staff positions were determined centrally within UNMIK and did not match the needs of the courts. As a result, staff members were often hired under a job title that did not correspond to the services actually performed.

Moreover, respondents said they lack any sort of control over their budgets once allocated. Most day-to-day supplies such as paper and pencils can be obtained through local vendors, with bills being forwarded to UNMIK. However, other requests would first have to be sent to UNMIK for processing. One judge reported having to wait three months for file folders. Others stressed that some court-appointed counsel, lay judges, and court experts have gone unpaid for months or even a year.


Kosovo's new Provisional Institutions of Self-Government will eventually take over much of the responsibility for the preparation of future budgets. The Ministry of Finance and Economy and the Assembly will play significant roles in the budgeting process, but the SRSG will retain "final authority to set the financial and policy parameters for, and to approve, the Kosovo Consolidated Budget." CONST. FRAMEWORK § 8.1.c. With respect to the budget for the judiciary, it is likely that the Ministry of Public Services will be charged with budgeting for the courts, given its responsibility for the "provision of technical and financial requirements, support personnel and material resources to ensure the effective functioning of the judicial and prosecutorial systems." See UNMIK REGULATION NO. 2001/19 ON THE EXECUTIVE BRANCH OF THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT IN KOSOVO, Annex IX para. xi, UN DOC. UNMIK/REG/2001/19, (___ O.G. ___ UNMIK CITE). See also CONST. FRAMEWORK § 5.3(c). At the same time, it is also possible that UNMIK's DOJ will wish to maintain direct control over the budgeting process for the



courts. However, a third and better alternative would be to establish an office of the administration of the budget within the judiciary itself.

Factor 11: Adequacy of Judicial Salaries

Judicial salaries are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income.

Conclusion	Correlation: Negative
 <p>Judicial salaries are on a par with those of other civil servants, but they are not sufficient to attract and retain the most qualified candidates or to enable judges to support their families in a reasonably secure manner.</p>	

Analysis/Background:

Almost all respondents felt that judicial salaries are insufficient to attract and retain qualified judges, citing many instances in which judges had recently left the bench in order to earn more money as private practitioners. While former judges were initially eager to return to the bench following a decade in which they were barred from serving as judges, for many the return was an act of patriotism. Unfortunately, current salaries are likely to be insufficient to attract and retain new talent, and some current appointees are already leaving.

Moreover, respondents felt that current salary levels are not sufficient to enable judges to support their families and live in a reasonably secure environment. Many pointed out that, because of the huge international community in Kosovo, the cost of living is much higher than in some neighboring areas. Although cost of living statistics were not found, it is believed that housing rental rates in Pristina are particularly high as compared with those in other parts of the FRY and in neighboring countries. Moreover, judges are prohibited from engaging in other occupations while on the bench and cannot legitimately augment their salaries the way other civil servants might. See REG/2001/8 ON THE KJPC § 5.5 ("A judge or prosecutor shall not hold any other public or administrative office or engage in any occupation of a professional nature. . . . The Council may authorize a judge or prosecutor. . . to engage in outside activities, such as to lecture or exercise a function in his/her field of competence, which do not affect the independence or dignity of their office."). Many families in Kosovo live on lower incomes than those of judges, but judges have unique security needs. One respondent pointed out that most judges in Kosovo do not have, and cannot afford, a vehicle. He said many will hear serious criminal cases during the day, and then ride their bicycles home through the community after work.

Budgetary authorities in Kosovo have a particularly difficult task in setting salary levels that are consistent with Kosovo's revenue generating potential. Authorities have been wise to set salaries that are realistic and that can be supported by future budgets in Kosovo. Nevertheless, those who establish salary levels need to take into consideration the unique position of the judiciary in the development of a democratic system in Kosovo and to consider future incremental increases for judges and for court staff.

After a recent increase, monthly judicial salaries are as follows: President of the Supreme Court 1080DM (\$524);⁹ Judge of the Supreme Court 1008DM (\$489); President of the District Court 936DM (\$454); Judge of the District Court 864DM (\$419); President of the Municipal Court

⁹ Based on March 27, 2002 conversion rates of 1DM=0.532EUR=\$0.485.

792DM (\$384); Judge of the Municipal Court 720DM (\$349); President of the Court of Minor Offenses 672DM (\$326); and Judge of the Court of Minor Offenses 567DM (\$279). (Data provided by the Transitional Central Fiscal Authority). These salaries are not currently subject to taxation. Judges are not yet guaranteed a pension.

International judges are paid under the UN professional salary scale commensurate with their experience. Their salaries are paid from the UN, not from Kosovo's Consolidated Budget. International judge salaries are seen as sufficient to attract qualified international judges to Kosovo, although most still choose to serve for only a limited time.

Factor 12: Judicial Buildings

Judicial buildings are conveniently located and easy to find, and they provide a respectable environment for the dispensation of justice with adequate infrastructure.

<u>Conclusion</u>	<u>Correlation: Neutral</u>
Judicial buildings are conveniently located and easy to find. While the majority of courts are sufficient to fulfill their intended purpose, some are overcrowded, lack a sufficient number of courtrooms, or otherwise provide a poor environment for the dispensation of justice.	

Analysis/Background:

Court buildings are for the most part conveniently located and easy to find. Years of neglect during the Milosevic regime, however, left many public buildings in Kosovo in a state of disrepair. While court buildings now are generally structurally sound and are equipped with donor-provided generators, problems are observed in many. The District Court building in Gjilan/Gnjilane, for example, appears to be in good condition, but it is overcrowded. The Mitrovica District Court, situated in North Mitrovica, remains barricaded in because of security concerns, and movement is restricted into the area of the court building. Respondents felt that the special security situation there led to a court facility that did not provide a respectable environment for the dispensation of justice. (Construction of an annex to the Mitrovica Court building is underway). The Supreme Court of Kosovo holds sessions in a make-shift hearing room that has the appearance of a very small meeting room. Because of the work load of the Court, not all sessions can be held in this room, and some sessions are held in the judges' small offices. Similarly, in other court houses, there are an insufficient number of courtrooms, and hearings often take place in judges' cramped offices. Most often, court buildings and court rooms lack separate circulation systems for judges, defendants, and the public. Court generators sometimes do not function, and courts are left without heating and lights during frequent power outages. Most, if not all, courts lack water reservoir systems to provide water during regularly scheduled interruptions in water service. Nevertheless, despite the problems cited in some court buildings, court premises for the most part appear to be minimally sufficient to support the work of the judiciary.



Factor 13: Judicial Security

Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.

<i>Conclusion</i>	<i>Correlation: Negative</i>
Additional resources are needed to help protect judges from security threats, particularly as additional minority judges join the bench.	

Analysis/Background:

Some respondents indicated that judges were on occasion threatened and intimidated. Others said they had suffered no serious threats, but nevertheless, they felt that security measures were insufficient.

KFOR and UN Civil Police have provided additional security to judges in some circumstances. For example, KFOR and the UN help provide security to the Mitrovica District Court in North Mitrovica. UN Civil Police provide secure transportation to the courthouse for judges, lawyers, and litigants coming from South Mitrovica, and UN Civil Police provide some level of security for Kosovo Albanian judges living in the Kosovo Serb area of Mitrovica north of the Ibar River. KFOR, UN Civil Police, and the Kosovo Police Service have been very helpful in providing security to judges at judicial training activities. Often, however, judges dealing with sensitive cases involving former members of the Kosovo Liberation Army (KLA) do not request additional protection from international security forces. Some speculated that requesting protection could be a sign of a lack of patriotism, or it could increase security risks by signaling that the judge intended to rule against the former KLA members.

Security within court buildings is also poor. Some—but not all—court houses have metal detectors at the doors. No package scanners were observed. While some facilities have a police officer as a guard, other court buildings have no security personnel (except personnel assigned to guard a particular defendant during court proceedings).

While for the most part denying direct threats, many sitting judges complained of a lack of security in comparison with the security provided to international judges. Many, if not all, international judges receive twenty-four hour protection, including armed close protection when in the courthouse or in public. One respondent observed that the protection provided to one international judge during a court session exceeded the protection given to all the other judges on the court combined. Nevertheless, despite this apt and unfavorable comparison, employing international judges in the Kosovo courts, in and of itself, helps to reduce the risk against domestic judges. First, allocation of war crimes cases and other serious inter-ethnic criminal matters to the international judges reduces the risk to Kosovar judges who would otherwise take full responsibility for these cases. Second, where international judges work, the presence of their close protection is likely to reduce the risk against others working in the same courthouse.

In the early days of the UNMIK administration, threats against Kosovo Serb members of the judiciary were common. The few Kosovo Serb Judges appointed in 1999 all eventually quit the judiciary citing personal security concerns. While a few Kosovo Serb judges have returned to the bench, implementation of a comprehensive plan of additional security for at-risk judges is needed in order to encourage greater ethnic balance in the judiciary.

IV. Structural Safeguards

Factor 14: Guaranteed tenure

Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.

Conclusion	Correlation: <i>Neutral</i>
Domestic judges have been appointed to the end of the UNMIK mission in Kosovo. International judges serve six-month renewable contract terms.	

Analysis/Background:

No provision of the applicable UNMIK Regulations speaks to the duration of the appointment of judges, and the determination of the term of appointments appears to be at the sole discretion of the SRSG. In the beginning of the UNMIK mission, judges were appointed for three-, six- and nine-month renewable contract terms. In December 2001, judges were reappointed to serve until the end of the UNMIK administration in Kosovo. Because the term of the UNMIK mission is undefined, UNMIK selected this term as the maximum it could provide within its mandate in Kosovo under Security Council Resolution 1244. Any new judges appointed will likely be appointed for the same term. While not stated expressly in the law, judges' tenure during this period appears to be guaranteed and judges can likely be removed only for cause. See REG/2001/8 ON THE KJPC (providing for the removal of judges through disciplinary proceedings); *but see* CONST. FRAMEWORK § 8.1.g. ("Decisions on the promotion, transfer and dismissal of judges and prosecutors shall be taken by the SRSG on the basis of recommendations by the Kosovo Judicial and Prosecutorial Council *and exceptionally on his own initiative.*") (emphasis added).

International judges, on the other hand, serve under renewable six-month contracts. This duration leaves them susceptible to executive branch influence in performing their duties (see Factor 20 below).

Factor 15: Objective Judicial Advancement Criteria

Judges are advanced through the judicial system on the basis of objective criteria such as ability, integrity, and experience.

Conclusion	Correlation: <i>Neutral</i>
Because the new judiciary has been in place little more than two years, it is too early to assess the system of advancement of judges.	

Analysis/Background:

While some judges had served for brief periods in lower courts, most judges were appointed directly to their current positions by the UNMIK administration. Thus, there have been too few promotions upon which to base an evaluation of the system of advancement.



Future decisions on the advancement of judges will be made by the SRSG, on the recommendation of the KJPC. Exceptionally, the SRSG could make decisions on the promotion of judges on his own initiative. CONST. FRAMEWORK § 8.1.g. Because the Constitutional Framework provides the Assembly with a role in the appointment of judges, it would appear that the Assembly has this role also with respect to the reappointment of a sitting judge to a higher post. Under a recent UNMIK Administrative Direction,¹⁰ the KJPC will base promotion decisions, among other things, on judicial evaluations that are to take place by October of each year, beginning in 2002. See UNMIK ADMINISTRATIVE DIRECTION NO. 2001/17 IMPLEMENTING UNMIK REGULATION NO. 2001/8 ON THE ESTABLISHMENT OF THE KOSOVO JUDICIAL AND PROSECUTORIAL COUNCIL, UN DOC. UNMIK/DIR/2001/17 [hereafter DIR/2001/17 ON JUDICIAL AND PROSECUTORIAL EVALUATIONS]. Because no evaluations have been completed, it is too early to assess the objectivity of the system in practice.

Factor 16: Judicial Immunity for Official Actions

Judges have immunity for actions taken in their official capacity.

Conclusion	Correlation: <i>Neutral</i>
Past provisions grant judges limited immunity for some actions taken in their official capacity, but might be difficult to apply given that the bodies responsible for the lifting of immunity no longer exist. No UNMIK regulation addresses the immunity of judges.	

Analysis/Background:

The Law on the Regular Courts provides that “a judge and lay-judge cannot be called to responsibility because of the opinion given in the making of a court decision.” See LAW ON THE REGULAR COURTS art. 11, *as amended by* LAW ON AMENDMENTS TO THE LAW ON THE REGULAR COURTS art. 1, O.G. SAP KOS. 2/89. Moreover, they cannot be detained in a procedure initiated for a criminal offense committed in performing official duties, “without the approval of the assembly of the social-political community which appointed them.” *Id.* Because provisions on the lifting of immunity refer to the former assemblies of social-political communities, it is unclear what procedure would be followed to seek the lifting of judicial immunity now. Presumably such power would rest with the SRSG or KJPC.

Similarly, the Constitution of the Socialist Autonomous Province of Kosovo provides that:

No one that participates in adjudication may be prosecuted for his opinion given in the process of taking a court decision. No one, who in the course of exercising the judge function has committed a criminal action for which a procedure is initiated, may be put in detention without permission of the authorized assembly of the social political community. Judges are accountable according to law for violations of the judge duty or the judge function prestige.

CONSTITUTION OF THE SOCIALIST AUTONOMOUS PROVINCE OF KOSOVO art. 250 (1974).

¹⁰ While UNMIK Regulations operate as regular laws, Administrative Directions are enacted to implement regulations. Both are signed by the SRSG. UNMIK Administrative Instructions can be issued by the Deputy Special Representatives of the Secretary General in charge of each UNMIK Pillar. The SRSG has, on occasion, also issued emergency decrees and executive orders. All such instruments take precedence over prior Kosovo and FRY law.

Prior law also provided civil liability for harm caused by judges in performing their duties, if the harm was either purposefully caused or due to extreme negligence. The Law on Regular Courts provided that the social-political community that had, through its assembly, appointed a judge would be liable if the judge's "illegal or improper work" caused damage to a citizen or legal person. LAW ON THE REGULAR COURTS art. 75. The social-political community had the right to seek indemnification from the judge, if the damage was caused "on purpose or by extreme negligence." *Id.* Given that judges are now appointed by the SRSG, this provision would be difficult or impossible to apply. Nevertheless, it leaves open the argument that a judge could be held accountable for money damages for extreme negligence in his/her work.

The Criminal Code of Kosovo provides criminal liability for a judge or lay judge "who in order to obtain benefit for another person or to cause any damage to another person, promulgates an illegal act or in any other way violates the law." CRIMINAL CODE OF THE SOCIALIST AUTONOMOUS PROVINCE OF KOSOVO § 211, O.G. SAP KOS. 20/77. Thus, criminal liability appears to attach only where a judge violates the law with the intention to benefit himself or herself or to cause harm to another.

The Constitutional Framework grants limited immunity to Kosovo's executive and legislative branch officials, but it does not do so for judges. See CONST. FRAMEWORK §§ 9.1.24 (members of the assembly), 9.2.6 (President of Kosovo), 9.3.19 (members of the Government). No UNMIK regulation specifically addresses the immunity of judges. Despite some lack of clarity on the issue, and no new provisions affirming judges' immunity for their official actions, respondents said there had no recent violation of the principle of judicial immunity.

Factor 17: Removal and Discipline of Judges

Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.

Conclusion	Correlation: <i>Neutral</i>
While refinements are needed in the governing legal provisions, disciplinary proceedings conducted thus far have been for specified official misconduct and have been governed by objective criteria. International judges are not subject to discipline before the KJPC, and the SRSG retains the authority to remove domestic and international judges on his own initiative.	

Analysis/Background:

Domestic judges and lay-judges may be removed or disciplined for official misconduct through a process before the Kosovo Judicial and Prosecutorial Council. See REG/2001/8 ON THE KJPC §§ 7.1 to 7.16. When misconduct has been established, the KJPC can issue a reprimand or reprimand with warning to a judge or lay judge, suspend a judge for up to six months, or can recommend to the SRSG the removal of a judge or lay judge. *Id.* § 7.10. Misconduct is defined as: (a) commission of a criminal offence; (b) neglect of judicial functions; (c) acting in a manner incompatible with the obligation of a judge to be independent and impartial; (d) having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of his/her office; or (e) breach of the code of ethics and conduct. *Id.* § 7.11.

The codes of ethics for judges and lay judges contain fairly comprehensive sets of ethical principles and rules of conduct. See CODE OF ETHICS AND PROFESSIONAL CONDUCT FOR JUDGES (approved November 28, 2001) (unpublished document available from the KJPC) [hereinafter CODE OF ETHICS FOR JUDGES]; CODE OF ETHICS AND CONDUCT FOR LAY-JUDGES (approved November 28, 2001) (unpublished document available from the KJPC). While the standards



governing conduct are broad-ranging, the distinction between proscriptive rules and guiding principles is not clear, leaving the possibility for a judge to be sanctioned by the KJPC for conduct that would not normally give rise to disciplinary proceedings. For example, a judge could conceivably be sanctioned for not being an efficient supervisor of court staff. See CODE OF ETHICS FOR JUDGES § III.B.2.a (“judge shall respect the necessary obligations pertaining to his/her function in terms of supervision of other court staff under his/her control.”). While it is incumbent on the KJPC to issue sanctions that are in proportion with the misconduct, judges might conceivably be removed for a simple violation of any provision of the codes. REG/2001/8 ON THE KJPC § 7.13. Moreover, as of February 2002, the codes of ethics had not been widely distributed to the judiciary. It would be, to say the least, extremely problematic to hold judges accountable in disciplinary proceedings for the violation of provisions of an ethical code that had not been distributed in local languages (unless such provisions already existed under prior law).

Under the law, the KJPC is composed of international and national legal professionals appointed by the SRSG. *Id.* §§ 2.1, 2.2. There is no requirement that a particular percentage of KJPC members come from the ranks of the judiciary. As of February 2002, the KJPC was short one member and was composed of four nationals and four internationals. Of the four national members, three are Kosovo Albanians and one is a Kosovo Serb. Although more than half of the current members have at some point served as judges, fewer than half are current judges.

While disciplinary proceedings before the KJPC are not generally publicly announced in advance, the law requires that proceedings be open to the public unless the KJPC determines that the interests of justice require otherwise. REG/2001/8 ON THE KJPC § 7.9. However, KJPC’s internal rules appear to be inconsistent with the regulation in that they shift the presumption toward considering proceedings to be closed as a matter of course. The internal rules provide that “[a]ll meetings of the Council shall be conducted in closed session, except when the Council expressly invites the presence of non-members.” KJPC INTERNAL RULES art. 28. Deliberations of the KJPC are closed, and it is not clear whether the KJPC’s written decisions are open to public scrutiny.

Those accused of misconduct have a limited right to be represented by legal counsel. “The person under investigation may be assisted and, in case of sickness or for other justified reasons, represented by a peer or a defense counsel who shall be granted access to the file, including all documents collected during the investigation.” REG/2001/8 ON THE KJPC § 7.7. See also KJPC INTERNAL RULES art. 55(d) (KJPC to verify “the justifications given by the defendant for being represented pursuant to Section 7.7 of the Regulation.”). Those accused are permitted to call witnesses in their defense and generally appear to have a full range of procedural protections in the process. Decisions of the KJPC in disciplinary cases are not subject to any form of appellate review. Despite the foregoing, respondents had no complaints about the procedural protections granted judges in practice before the KJPC.

Since its formation in the middle of 2001, the KJPC has begun to be quite active in addressing cases of alleged misconduct by judges. As of February 2002, the KJPC had issued final decisions in eight disciplinary cases. Of these, five judges were recommended for removal, two were issued reprimands, and in one case misconduct was not proven. Many other cases are being investigated by the DOJ’s Judicial Inspection Unit, or are in process before the KJPC. Respondents generally felt that the process before the KJPC was efficient, fair, and objective.

The SRSG has retained the right to promote, transfer or dismiss judges and prosecutors on his own initiative. CONST. FRAMEWORK § 9.4.8. Thus far, the SRSG has not used this power, and disciplinary proceedings have only taken place through the KJPC. Nevertheless, it appears that the SRSG has authority under the Constitutional Framework to remove a judge without a hearing and without the obligation to offer any rationale for such a decision.

The SRSG is the only authority with competence to remove international judges. While he has yet to exercise this power, he may remove international judges on the basis of: “(a) physical or

mental incapacity which is likely to be permanent or prolonged; (b) serious misconduct; (c) failure in the due execution of office; or (d) having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office.” REG/2001/2 ON THE APPOINTMENT AND REMOVAL OF INTERNATIONAL JUDGES AND PROSECUTORS § 4.1. In its most recent review of the judicial system, the OSCE recommended that “[i]nternational judges and prosecutors . . . be subjected to the same mechanism of disciplinary accountability as any other member of the judiciary.” OSCE DEPARTMENT OF HUMAN RIGHTS AND RULE OF LAW, *Kosovo Review of the Criminal Justice System (September 2001 – February 2002)* 43 [hereinafter *OSCE Judicial System Review (September 2001 – February 2002)*]. It remains to be seen whether, and to what extent, other authorities within UNMIK will heed this recommendation.

A recent administrative direction establishes a system for the evaluation of sitting professional judges. See DIR/2001/17 ON JUDICIAL AND PROSECUTORIAL EVALUATIONS. While not stated expressly in the administrative direction, the evaluations might be used as evidence in a disciplinary proceeding. *Id.* § 2 (purpose of evaluation system). The evaluations will be conducted by judges who are more senior in their posts, and at most levels judges will have the opportunity to contest an unfavorable evaluation to a higher level. This signals a positive departure from the prior system of judicial evaluation that operated in the SFRY, which focused excessively on the quantity of decisions rendered by a judge and the number of reversals by a higher court. Because the first evaluations are not due until October 2002, it is too early to assess the efficacy and fairness of this evaluation system.

Factor 18: Case Assignment

Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and they may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.

Conclusion	Correlation: Negative
Court presidents have wide discretion in assigning cases to domestic judges and in selecting lay-judges for trial panels. There is no random case assignment system for international judges.	

Analysis/Background:

Internal court rules provide the court president with the authority to determine “distribution of works.” RULES ON THE INTERNAL ACTIVITY OF THE COURTS art. 58, O.G. SAP KOS. 7/81 [hereinafter *COURT RULES*]. Some presidents indicated that they generally use a random assignment method, while others stressed that they attempt to assign cases based on the particular experience and expertise of the judges and their relative workloads. While no complaints were heard regarding the assignment of cases, the current system is susceptible to abuse.

A provision of the new Code of Ethics for Judges provides that court presidents or others charged with assigning cases should do so by “drawing of lots, automatic distribution according to alphabetic order or some similar system.” CODE OF ETHICS FOR JUDGES § III.B.5. Additional guidance in the form of a regulation, administrative direction, or administrative instruction is needed in order to implement a new method of case assignment. In this regard, a USAID-funded project has developed, and will install, basic random case assignment software in the Kosovo courts.

Court presidents also assign lay judges to three- and five-judge panels from a roster of appointed lay judges. See *COURT RULES* arts. 54-55. Even though professional judges hold great sway



over their lay-judge colleagues, it would theoretically be quite possible to influence the outcome of cases by appointing lay judges of a particular predisposition from the roster.

International judges have the authority to select cases on their own prerogative. REG/2001/2 ON THE APPOINTMENT AND REMOVAL OF INTERNATIONAL JUDGES AND PROSECUTORS § 1.2. In addition, based on a recommendation from the prosecutor, accused, defense counsel, or the DOJ, the SRSG can determine that a particular case should, in the interests of justice, be heard by international judges. See UNMIK REGULATION NO. 2000/64 ON THE ASSIGNMENT OF INTERNATIONAL JUDGES AND PROSECUTORS AND/OR CHANGE OF VENUE §§ 1.1 to 1.3, UN Doc. UNNMIK/REG/2000/64, 2000:5 O.G. 972-974 (providing such a role to the former UNMIK DJA). Once the SRSG has made such a determination, the DOJ will designate an international prosecutor and international judges for the case. The DOJ appoints a trial panel composed of only three judges (as opposed to five judge panels otherwise required for some serious criminal offenses), at least two of whom must be international judges. One of the international judges serves as president. Some respondents felt that DOJ tended to use this appointment process to appoint judges who were seen as more likely to be cooperative with DOJ in dealing with the case. Viewing this system as an infringement on judicial independence, the OSCE has recently recommended that precise criteria be established for the assignment of cases to international judges, that the SRSG be required to articulate the reasons for removal of a case from the local judiciary, and that the international judges assigned to the case be selected randomly. See OSCE *Judicial System Review (September 2001 – February 2002)* at 43-44.

Judges may only be removed from a case for reasons including conflict of interest. See CODE CIV. PROC. arts. 71-76; CODE CRIM. PROC. arts. 39-44. Requests for removal are addressed to the president of the respective court. CODE CIV. PROC. art. 74.

Factor 19: Judicial Associations

An association exists, the sole aim of which is to protect and promote the interests of the judiciary, and this organization is active.

<i>Conclusion</i>	<i>Correlation: Neutral</i>
The Judges Association of Kosovo was recently formed and has held some activities. Additional efforts are needed to assist the association to become more active in protecting and promoting the interests of judges.	

Analysis/Background:

In May 2001, the Judges Association of Kosovo held its first meeting, elected its leadership, and approved the association's organizational statute. Shortly thereafter, the association filed for registration as a legal entity. Membership in the association is optional, but most judges in Kosovo have joined. With the help of ABA/CEELI, this nascent organization has begun to hold some activities. For example, judges who participate in training activities abroad meet with other members of the association on their return to share what they have learned. Recently, with donor support, judges throughout Kosovo have been meeting to help develop input for a strategy for development and reform of the judiciary. The final input will be shared with UNMIK authorities.

While establishment of the association is a good step, it needs to become more active in advocating the interests of the judiciary. For example, judges should become more active in providing input into UNMIK regulations and subsidiary instruments, and into the laws of the newly formed Assembly. One judge respondent fondly recounted how, under the prior socialist system,

representatives of the judiciary were consulted on the drafting of laws relating to the judicial system. He said that this does not happen under the international administration. Greater efforts are required by the judges themselves, and greater openness is required in the UNMIK law-making process, to assure that judges have direct input into the laws and policies affecting them.

V. Accountability and Transparency

Factor 20: Judicial Decisions and Improper Influence

Judicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g., court presidents), private interests, or other branches of government.

Conclusion	Correlation: Negative
Social pressures, fear, ethnic bias, and governmental pressure can influence the outcome in some cases. The assignment of international judges to sensitive cases has helped reduce the pressure on the local judiciary in inter-ethnic cases.	

Analysis/Background:

Respondents identified various types of undue influence that can impact the outcome of cases, including social pressures, fear from criminal factions, ethnic bias, and governmental influence.

As elsewhere in the region, it is not uncommon for friends, colleagues and relatives to try directly or indirectly to influence a judge or lay judge in his/her decision making. This sort of trading in favors has been a common part of the cultural tradition in Kosovo. One respondent said that some judges give in to such pressures and that others resist. Lay judges are less aware of the impropriety of such action and are more likely to give into it. While professional judges are fully aware that this sort of pressure should not influence their decisions, there is no social barrier preventing a citizen from requesting a “favor.”

Lay judges are often likely to go along with professional judges in reaching decisions, rather than making their own independent assessment of the law and facts of the case. The lack of training for lay judges increases their reliance on professional judges in the panel.

Heavy social pressure and indirect threats are brought to bear on judges in cases involving former members of the Kosovo Liberation Army (KLA). Judges could be castigated by society as “unpatriotic” if they convict “former war heroes” for crimes committed after the war. Respondents stressed that international judges should be assigned to cases involving former KLA members, because they would be less susceptible to such pressures. (Presently, international judges and prosecutors deal primarily with inter-ethnic crimes.). At least one respondent said this type of pressure is on the rise, as is pressure from organized crime.

Some international commentators felt that ethnic bias is a serious and continuing problem in the judiciary and that a Kosovo Serb defendant would likely receive harsher treatment than a Kosovo Albanian defendant before a local panel of Kosovo Albanian judges. A local respondent admitted that bias had been a problem in the period immediately following the war, but that courts are now much more ready to deal with cases in a fair and impartial manner. The use of international judges in inter-ethnic cases has helped reduce the effect of potential ethnic bias. All respondents felt that additional Kosovo Serb judges are needed in the system.



One respondent reported that a local municipal council and political party had direct influence over the court in a particular case. The case in question had been filed by former state workers who were seeking reinstatement to their positions. The court allegedly delayed taking any action in the case for months after its filing, allegedly at the wishes of the municipal council.

Cases of judicial corruption have been investigated, and disciplinary actions have been taken before the KJPC. Respondents generally indicated that bribery is a problem, but that it is not likely widespread. Nevertheless, despite very positive steps taken recently by the KJPC, additional precautions need to be taken to help curb the problem before it gets worse. Regulations on the reporting and verification of assets, increased criminal investigation of suspected cases of corruption, modified and modernized investigative techniques, changes to the rules of evidence, and enforcement of the codes of judicial conduct could help reduce the risk of judicial corruption.

Two respondents said that some private practitioners are rumored to ask clients for extra money, under the pretense that they will bribe the judge. Respondents believed that this was simple fraud by the lawyer rather than cases of actual judicial bribery.

A few respondents said that, at times, officials of the international administration appeared to attempt to influence domestic judges in their decision making. One respondent said that an OSCE trial monitor pressured the court to convene a pre-trial detention hearing promptly (as required under applicable procedure). Two respondents provided an anecdotal account of an UNMIK official telling a judge “to remember who appoints you” in ruling on a matter. In another account, a respondent said that a UN Civil Police officer repeatedly quizzed a judge on why he had ruled a certain way in a criminal matter. One other respondent recounted the tale of a member of the UNMIK administration telling a local judge to give a defendant the maximum fine allowable under the applicable law.

Multiple respondents said that, at times, the international administration exerted undue influence over international judges. One respondent, however, related first-hand that the international administration had not influenced his judicial decision-making and said he was unaware of such influences over other judges. Often times, it appears that international judges are mistakenly thought of as simple UN employees and that their independence is not respected. One international judge reportedly received a written instruction that certain defendants should not be let out of pre-trial detention (the writing was *not* lodged as a formal motion to the court). Another judge was reportedly asked by an UNMIK official why he/she had not consulted with the official before releasing a defendant from custody. Moreover, some respondents felt that the DOJ practiced “judge shopping” when selecting international panels for criminal cases by selecting judges that it anticipated would rule favorably. International judges have privately complained of this interference, but generally only upon the end of their tenure. Such influence by executive branch officials, no matter how well intended, provides an extremely poor precedent for Kosovo’s self-governing executive branch, violates the principle of separation of powers, and is contrary to applicable international standards.¹¹

The six-month term of office of international judges greatly increases the likelihood of executive branch influence over the decisions of international judges. Judges hoping for a contract extension, higher grade-level within the UN system, or future job opportunities with the UN are more likely to rule in a way that they believe would be viewed as favorable by executive branch authorities.

¹¹ The OSCE—as Pillar III within the UNMIK structure—pointedly recommended that “[a]s a guarantee of judicial independence, the SRSG and KFOR should officially abandon any kind of executive or legislative interference in the area of the judicial authority, especially in the area of detention.” OSCE *Judicial System Review* (September 2001 – February 2002) at 43.

ABA/CEELI was initially denied access to interview international judges. Officials of the DOJ confirmed that a written policy prohibits judges from speaking with those outside the UN system on matters relating to the work of the judiciary. While judges appeared eager to talk, most felt they were unable to do so given the policy. When CEELI requested a copy of the policy, it was informed that, while normal DOJ circulars are public, the policy restricting international judges from speaking about the judiciary was internal and could not be provided. After some weeks, CEELI eventually gained approval from the DOJ to speak with international judges and conducted follow-up interviews. Kosovo is the only place thus far in which judges needed executive branch approval to participate in JRI interviews.

Factor 21: Code of Ethics

A judicial code of ethics exists to address major issues such as conflicts of interest, ex parte communications, and inappropriate political activity, and judges are required to receive training concerning this code both before taking office and during their tenure.

<i>Conclusion</i>	<i>Correlation: Neutral</i>
A comprehensive code of judicial ethics was passed in late 2001, but had not been widely disseminated at the time of the JRI interviews. Judges are not required to receive training on the code before taking office or during their tenure.	

Analysis/Background:

On November 28, 2001, the SRSG signed into force the Code of Ethics and Professional Conduct for Judges and Code of Ethics and Conduct for Lay-Judges, along with a code of ethics for prosecutors. The codes apply to all judges in Kosovo, presumably including international judges. See CODE OF ETHICS FOR JUDGES, Preamble (“This code applies to all professional judges in Kosovo, including those dealing with criminal, civil, commercial and administrative law matters, at all level of proceedings including Minor Offences Courts.”). As of February 2002, the codes had not been widely disseminated to judges or other legal professionals in Kosovo. The failure to distribute the codes in local languages undermines the effort to inculcate strong principles of judicial ethics in Kosovo and could render any new provisions contained therein unenforceable.

The code for professional judges is basically comprehensive, addressing conflicts of interest, ex parte communications, inappropriate political activity, and other major issues. The code for lay judges covers major issues such as conflicts of interest and political activity, but does not expressly forbid ex parte communications. Moreover, the distinction between proscriptive rules and guiding principles is not clear in the codes. This could prove problematic, given that violation of the codes is a basis for the discipline or removal of domestic judges and lay judges. See REG/2001/8 ON THE KJPC §§ 7.11(e), 7.12(e).

While enforcement mechanisms exist for ethical violations by domestic judges and lay judges, there are no specific enforcement mechanisms for misconduct by international judges. International judges may be removed by the SRSG in summary fashion. CONST. FRAMEWORK § 8.1(g).

Judges are not yet required to receive training on the codes, either before appointment or during their tenure. If the new system for the selection and training of judges is adopted, new professional domestic judges will be required to attend a course on judicial ethics before their appointment. See *Draft Regulation on the KJI* § 8.2(c). (See also discussion under Factor 1 above).



Factor 22: Judicial Conduct Complaint Process

A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.

<i>Conclusion</i>	<i>Correlation: Neutral</i>
There is no procedure specified for citizens to lodge complaints regarding judicial conduct. While the public can address such complaints to the Judicial Inspection Unit of the Department of Justice, the public is not well-informed of this possibility.	

Analysis/Background:

Under the law, only the SRSG or the DOJ can address complaints directly to the Kosovo Judicial and Prosecutorial Council. See REG/2001/8 ON THE KJPC § 7.2 (providing the SRSG or the Co-Heads of the former JIAS “Administrative Department of Justice” authority to lodge complaints). Once a complaint is lodged, a disciplinary proceeding automatically commences.

In practice, judges, lawyers, and the public can address any concerns or complaints about the conduct of judges to the DOJ’s Judicial Inspection Unit. Cf. UNMIK ADMINISTRATIVE DIRECTION NO. 2001/4 IMPLEMENTING UNMIK REGULATION NO. 2000/15 ON THE ESTABLISHMENT OF THE ADMINISTRATIVE DEPARTMENT OF JUSTICE § 2.2, UN Doc. UNMIK/DIR/2001/4 (establishing Judicial Inspection Unit to investigate complaints against judges or prosecutors). This avenue of public complaint is not specified in the law, and is not well-known by the public or by legal professionals. Moreover, as a remnant of the prior systems in Kosovo, many citizens are not yet comfortable with the concept that they have a right to complain to authorities about the conduct of judges. Additional steps are needed to clarify this avenue of complaint in the legal/regulatory framework and to inform the public of this right.

Factor 23: Public and Media Access to Proceedings

Courtroom proceedings are open to, and can accommodate, the public and the media.

<i>Conclusion</i>	<i>Correlation: Positive</i>
Despite several ill-defined exceptions in the law, court proceedings are in practice open to the public and media. Lack of courtroom space could hinder access in some cases.	

Analysis/Background:

The Constitutional Framework provides that “unless otherwise specified in the applicable law, all Kosovo courts shall hold proceedings in public.” CONST. FRAMEWORK § 9.4.5. Under applicable law, “[f]or the purpose of preserving a secret, protecting morals, interests of minors or other particular interests of the social community, the law shall specify the cases in which the public may be excluded.” LAW ON THE REGULAR COURTS art. 7, *as amended* by LAW ON AMENDMENTS TO THE LAW ON THE REGULAR COURTS art. 1, O.G. SAP Kos 49/79.

The Civil Procedure Code further elaborates that the panel may decide to exclude the public if necessary “for preservation of an official, business or personal secret,” for “interests of public order,” for “reasons of morality,” or “when the measures for keeping order prescribed by this Code

do not suffice to ensure uninterrupted proceedings.” CODE CIV. PROC. art. 305. In order to close a proceeding, the panel must issue a written order explaining the decision and the order must be publicly announced. *Id.* at art. 309. There is no right to appeal a decision excluding the public. *Id.*

Criminal trial proceedings are generally open, but the investigative phase is appropriately closed, as are trial panel deliberations. The public may be excluded from trial proceedings if required “to preserve secrecy,” “to preserve public law and order,” “to protect morality,” “to protect the interests of a minor,” or “to protect other particular interests of the public morality.” CODE CRIM. PROC. art. 288. The panel must substantiate its decision to close a proceeding in an order that is made public. *Id.* at art. 290. The decision closing the proceeding may only be challenged in the appeal of the court’s verdict. *Id.* The court may also clear the courtroom if steps taken to preserve order have been ineffective. *Id.* at art. 294(2)

In practice, despite the ill-defined standards for closing a proceeding and the extremely limited right to appeal such a decision, Kosovo courts generally have honored and observed the public hearing requirement. While courts are required to schedule cases of public interest in larger courtrooms, other matters heard in judges’ small offices have little room for public or media attendance. See COURT RULES art. 8 (public character of the work of the courts). Courts are required to post the hearing schedule publicly. *Id.* at arts. 8, 75-76. One respondent recounted a case in which KFOR, rather than the court, had ordered a proceeding closed for security reasons. Nevertheless, despite the lack of courtrooms and the large number of cases heard in judges’ cramped offices, respondents felt that they had appropriate access to observe court proceedings.

Factor 24: Publication of Judicial Decisions

Judicial decisions are generally a matter of public record, and significant appellate opinions are published and open to academic and public scrutiny.



Conclusion	Correlation: Negative
Only interested parties or others who demonstrate a “justifiable interest” can obtain copies of court decisions. No court opinions are published.	

Analysis/Background:

While judgments in most cases are announced in open court, copies of the rulings and decisions are generally only available to the parties to the case. See CODE CRIM. PROC. art. 352 (announcement of verdict in criminal case); CODE CIV. PROC. art. 335 (most civil judgments announced in open court); COURT RULES arts. 15, 82-84. Others with a “justifiable interest” could request a copy from the president of the court or authorized staff. See CODE CIV. PROC. art. 150 (parties and those with a “justifiable interest” may view and copy documents from court proceedings); CODE CRIM. PROC. art. 131 (anyone with a “legitimate interest” may generally see and copy records in criminal case). See *also* COURT RULES art. 15. Some court presidents indicated that they would freely provide copies to those requesting documents for academic or other stated purposes, while others seemed more closed. Court employees are restricted from providing certain information to unauthorized parties. See LAW ON REGULAR COURTS art. 113. Journalists said they could generally obtain copies of court decisions, but would most often do so from the parties, rather than from the court. No court decisions are published in Kosovo.



Factor 25: Maintenance of Trial Records

A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.

<i>Conclusion</i>	<i>Correlation: Negative</i>
Courts do not create verbatim transcripts of proceedings, and the court records that are maintained are not easily obtained by the public.	

Analysis/Background:

Courts do not produce verbatim transcripts of proceedings. Instead, “minutes” are taken during court proceedings; these minutes consist solely of the judge’s oral summary of the testimony of witnesses and the argument of counsel as transcribed by a court staff person by typewriter or computer. See CODE CIV. PROC. arts. 123-128; CODE CRIM. PROC. arts. 308-311; COURT RULES arts. 182-186. Although this process results in a record reflecting judge’s perception of the evidence and arguments, most respondents, nevertheless, indicated general satisfaction with the quality of the minutes produced.

One respondent noted that minutes often contain factual errors. Another respondent said that defense counsel often allow errors in the minutes to support a later appeal of a conviction in a criminal case.

With the exception of cases involving international judges, counsel are able to receive the minutes promptly following the court session. Where international judges are involved, minutes often have to be produced in three languages and can be delayed. See UNMIK REGULATION NO. 2000/46 ON THE USE OF LANGUAGE IN COURT PROCEEDINGS IN WHICH AN INTERNATIONAL JUDGE OR INTERNATIONAL PROSECUTOR PARTICIPATES, UN Doc. UNMIK/REG/2000/46, 2000:4 O.G. 721-722 (proceedings to be held in English and other languages required by law). Translation problems have often led to a delay in the production of the English version, leaving international judges in some cases to rule on a case without the benefit of a full copy of the record.

Public access to the court records is very limited and falls within the discretion of court presidents. Anyone other than a party to a particular case must justify his or her reason for obtaining the records, and several respondents suggested that a specific academic or journalistic purpose usually is required. Even if the records are made available, the requester often may only review them at the court and in the presence of court staff. In sum, courts are not accustomed to handling such requests, and there is no systematic method of dealing with them.

VI. Efficiency

Factor 26: Court Support Staff

Each judge has the basic human resource support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.

Conclusion	Correlation: Negative
While the total number of support staff positions in the court system at large might be sufficient, many courts require additional legal advisors and other particular staff. Existing staff often lack sufficient legal, administrative, and computer skills.	

Analysis/Background:

Many respondent judges said that the current number of support staff hired in their courts is insufficient. International respondents felt that the number of allocated court staff is sufficient, but that staff suffer from a lack of training. Moreover, low salaries and other factors have made it difficult to fill open posts.

Court administrative personnel are very poorly paid and are susceptible to inappropriate influences. They receive no training prior to commencing their duties, and their on-the-job training is limited. Judicial staff of all levels would benefit from legal, administrative, and computer training.

Many judges stressed the need for additional legal advisors to assist in the technical legal work of the courts, such as drafting court decisions, preparing summonses, and assisting in the investigation in criminal cases. Some felt that additional judicial trainees would also be useful and would help prepare future judges. Additional technical secretaries are needed in some courts.

The staffing table for the courts was established by the DOJ (and its predecessors—the UNMIK DJA and the ADoJ) during the budgetary process. Respondents in two courts said that the lack of input from the courts on staffing needs has led to a staffing table that does not comport with the needs of the courts. To compensate for this, some staff members are administratively posted in an open position in the staffing table, but serve a different function in practice.

Factor 27: Judicial Positions

A system exists so that new judicial positions are created as needed.

Conclusion	Correlation: Neutral
There is no fixed mechanism to establish new judicial positions. An <i>ad hoc</i> advisory body can be formed as needed to provide recommendations on the number of judges needed in Kosovo and on other matters relating to the structure of the judiciary.	



Analysis/Background:

The judicial structure in Kosovo and the number of judges in each court was initially determined by the SRSG upon the recommendation of the Technical Advisory Council on the Judiciary (TAC) in late 1999. The TAC, composed of national and international members, was an *ad hoc* council charged with making the initial recommendation to the SRSG on the structure of the judiciary. While the former TAC is no longer in existence, the DOJ contemplates establishing another advisory council to provide further recommendations on the court system, including on the number of judges. A new *ad hoc* council could be formed in the coming months.

Judges in some courts complain of a lack of judges and a resulting excessive work load. At the same time, some respondents said that more efficient organization of the work load, including better management of instances in which parties or witness fail to show for court proceedings and the hiring of additional legal advisors, could help alleviate this problem. Others observed that courts do not appear overworked, normally concluding their business by 4:00 p.m. (2:30 p.m. in Mitrovica for security reasons).

Of 420 approved posts for judges and prosecutors, 348 had been filled as of February 2002 (of these 297 are judges). Thus far, it appears that the DOJ (and its predecessor departments) has had actual control over how many judges and prosecutors to hire from among the available posts. Given potential changes in the role of the investigating judge under the new draft criminal procedure code, the mix of judges and prosecutors needed in Kosovo could shift rather dramatically in favor of fewer judges and more prosecutors.¹² Moreover, there are currently very few eligible candidates that have passed the required Judicial/Bar Examination. As such, it might be prudent for the KJPC or other decision makers not to rush to fill all available posts.

Thus, while there is no fixed mechanism for creating new judicial positions, the use of *ad hoc* councils to provide recommendations to the SRSG on the judicial structure appears to be an adequate interim solution in post-conflict Kosovo.

Factor 28: Case Filing and Tracking Systems

The judicial system maintains a case filing and tracking system that ensures cases are heard in a reasonably efficient manner.

Conclusion	Correlation: Neutral
While Kosovo's manual case filing and tracking systems tend to ensure the reasonably efficient handling of most cases, respondents complained of inaction and excessive delays in some matters. Tracking cases by plaintiff or defendant is difficult, and no subject matter index is maintained.	

Analysis/Background:

Respondents considered the manual case filing and tracking systems to be generally functional and adequate to handle current caseloads. Cases may be found by date of filing or by the parties' names.

¹² See *Draft Criminal Procedure Code of Kosovo* (draft of November 8, 2001) (awaiting approval). See also *Draft Criminal Code of Kosovo* (draft of November 8, 2001) (awaiting approval).

There is no system indexing cases by subject matter within each court and no Kosovo-wide case index of any kind. The lack of subject-matter indices for cases makes it difficult for litigants to see how courts are likely to deal with particular disputes, or for judges to draw on the experience of judges from higher courts in rendering decisions.

Moreover, there has been a tendency for courts to delay cases perceived as politically difficult. Some respondents indicated that suits by former workers for reinstatement to their prior positions had been delayed indefinitely by the courts. Courts have been slow to produce written verdicts in many cases, and in some instances, this practice has blocked criminal detainees from release or recourse to the appellate system. Many have suggested that, to address such problems, better systems need to be established to track cases through every stage of the process. One respondent observed that court presidents need to do a better job in following cases through their courts and in ensuring that all matters are handled in a timely fashion.

While the current system is functional, automation of the system within each court, and an eventual Kosovo-wide networked system would vastly improve case tracking. A current USAID project is helping to modernize accounting, budgetary, procurement, facilities management, and personnel systems, and it will introduce components of a court automation program.

Factor 29: Computers and Office Equipment

The judicial system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.

Conclusion	Correlation: <i>Neutral</i>
While additional equipment is needed in some courts, courts are generally equipped to perform their function.	

Analysis/Background:

Thanks to support from USAID and others, all courts in Kosovo are equipped with computers, other basic office equipment, and generators. Respondents reported that court equipment is, for the most part, timely repaired when it breaks down. Respondents were overwhelmingly thankful of donor initiatives in this area.

Some courts complained of poorly functioning generators, while others would benefit from additional photocopy machines (particularly to begin providing court decisions to the public) or other equipment. All courts could benefit from an eventual Kosovo-wide computer network for the courts, equipment to take simultaneous verbatim trial transcripts, and water reservoir systems to provide water when municipal water systems are shut off.

More importantly, steps need to be taken to ensure that court equipment is used efficiently. For the most part, courts' computers are used only for word processing, and courts do not have local area networks. Some judges and court staff are not trained in basic word processing and typing. Thus, while there is a need for some additional equipment, there is a greater need to train judges and staff on computer applications and to install local area networks to facilitate the sharing of data within a court.



Factor 30: Distribution and Indexing of Current Law

A system exists whereby all judges receive current domestic laws and jurisprudence in a timely manner, and there is a nationally recognized system for identifying and organizing changes in the law.

Conclusion	Correlation: Negative
Judges do not receive laws in local languages for months after their effective date, and higher court decisions are neither published nor widely distributed to members of the judiciary.	

Analysis/Background:

Respondents universally identified lack of access to UNMIK Regulations and subsidiary instruments as extremely problematic. While an UNMIK Official Gazette was started in the year 2000, it is distributed months after the laws contained therein take effect. See OFFICIAL GAZETTE OF THE UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO (1999-2000). One court president said that he received the last several volumes of the Official Gazette for the year 2000 at the end of the year 2001. As of March 2002, no Official Gazette had been distributed for regulations passed in the year 2001, and it is not clear whether the gazette is still in production. In one instance, a criminal case regarding trafficking in humans was said to have begun before the judges in the court had received copies of the regulation defining the criminal offense.

Slowness in publishing the gazette and in distributing individual regulations in local languages is caused by insufficient resources for their translation and a lack of political will to solve the problem. While in other legal systems new laws do not take effect until after their publication, UNMIK regulations generally take effect and are in force months before they are made available to judges and the public in local languages. Numerous observers within and outside the international administration have commented upon the problem, and they have urged its solution. See, e.g., DEPARTMENT FOR DEMOCRATIC GOVERNANCE AND CIVIL SOCIETY, *Recommendation to JIAS Departments, IAC, and the SRSG, Necessary Improvements to the Law-Making Process in Kosovo*, 6-7 (May 30, 2001).

Thanks to donor initiatives, judges have received many of the pre-1990 laws now applicable in Kosovo, including applicable criminal codes, the SFRY Criminal Procedure Code, the SFRY Civil Procedure Code, and most other prior legislation needed in the day-to-day work of the courts. Some respondents, however, said that other pre-1990 laws are difficult to obtain and that additional compilations of applicable civil laws are needed.

Many judges, but perhaps not all, have received copies of the Universal Declaration on Human Rights, the ECHR, and the ICCPR. Judges seemed less familiar with other international instruments applicable in Kosovo under the Constitutional Framework and appear not to have received copies of them all. A concerted effort is needed to make sure that all sitting judges and prosecutors have copies of (and training on) the applicable international instruments and that new judges and prosecutors are provided copies upon their appointment.

Court decisions, including decisions of the Supreme Court, are not published. Nor are copies distributed to the other courts for reference. Copies of appellate court decisions are generally only distributed to the court from which the case came.

One prosecutor said it would be extremely useful to review court decisions to see how a particular court might assess a given situation. Lack of publication and distribution of court decisions, and lack of a subject-matter index to the cases, makes it difficult or impossible to do so.



Another respondent found that it was not possible to obtain copies of Department of Justice Information Circulars which quantify court costs and fines. These documents are public, but do not appear in the Official Gazette or in any other publication.

An ABA/CEELI initiative has led to the development of an index to UN legal materials applicable in Kosovo. The index can be used to track changes to UNMIK legal acts and to identify acts by subject matter. See ABA/CEELI, CUMULATIVE INDEX OF UNITED NATIONS LEGAL MATERIALS PRODUCED AND APPLIED IN KOSOVO (January 2002). Prior applicable law is indexed through SAP Kosovo, SAR Serbia, and SFRY indices. These older indices identify changes in the laws, but are difficult to obtain.



Notes